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IN THE

Supreme Court of the United States

October Term, 1969

No. 1074

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDICES

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, General Electric Company,[1] prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit rendered and entered in this proceeding on December 2, 1969.

The Opinions Below

The opinions[2] of the Court of Appeals, not yet officially reported, appear in Appendix A hereto and are unofficially

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[1] Hereinafter "petitioner," "the Company," or "GE."

[2] There were three separate opinions: A lead opinion by Judge Kaufman, a separate concurring opinion by Judge Waterman and

reported at 72 LRRM 2530. The decision grants enforcement of the decision and order of the National Labor Relations Board (App. C 1-21),[3] reported at 150 NLRB 192, 57 LRRM 1491 (1964), which in turn affirmed and adopted in all respects the Intermediate Report (IR) of its trial examiner (App. C 22-267) officially reported at 150 NLRB 203 (1963).

Jurisdiction

The decision of the Court of Appeals for the Second Circuit issued on October 28, 1969, and judgment thereon was rendered and entered on December 2, 1969.[4] The Company's petition for rehearing in banc was denied also on December 2, 1969, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction to review the judgment below is invoked under 62 Stat. 928, 28 U.S.C. §1254(1).

Questions Presented

1. May an employer who has been found to have a genuine desire to reach agreement and who meets and confers with the union to that end be adjudged in violation of Sec-

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an opinion by Judge Friendly dissenting on the main issues presented by the case.

[3] Reference is to Appendix C submitted herewith. The Board's decision was also accompanied by three opinions: One Board member dissented totally from the decision of the majority and another dissented from the majority's views on the main issue in the case. Two Board members also dissented from the finding of a *per se* violation in connection with petitioner's offer of personal accident insurance (see *infra* pp. 32-35).

[4] A copy of said judgment appears in Appendix A hereto (App. A 78-79).

tion 8(a)(5) of the National Labor Relations Act, as amended ("the Act"), by virtue of his adherence to a collective bargaining policy of (a) presenting an offer during the course of bargaining which includes everything he feels is warranted and right, holding nothing back intentionally therefrom for later trading, and (b) changing that offer only when further discussion, changing conditions or the uncovering of new facts indicates that such offer falls short of being right?

2. May the NLRB limit or prohibit the communication of an employer's views, opinions and arguments to his employees in support of this bargaining policy on the ground that they inhibit the making of concessions by the employer beyond those included in his original offer?

3. Was it within the power of the NLRB to hold the employer's bargaining policy and communications illegal in combination and to require the employer either to alter his bargaining policy or to refrain from communicating it to his employees?

4. Does the bargaining order herein (a) meet the standards for clarity and specificity which must accompany any constitutionally supportable attempt to regulate or limit freedom of speech and (b) fairly apprise the employer of what conduct it forbids and what it permits?

5. Is it a *per se* violation of Section 8(a)(5) of the Act for an employer voluntarily to propose an added benefit to the union in a precompulsory bargaining period on the basis that if not accepted the proposal will be negotiable during the compulsory bargaining period but not before then?

6. Is it a *per se* violation of Section 8(a)(5) of the Act for an employer, who has not pleaded inability to pay, to refuse to give estimates of the cost of changes which he has offered in pension and insurance plans when such estimates are necessarily speculative and not matters of fact?

Constitutional and Statutory Provisions Involved

The First Amendment to the Constitution of the United States and the pertinent statutory provisions of the National Labor Relations Act, as amended, 49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 *et seq.* are set forth verbatim in Appendix B hereto.

Statement of the Case

A. *The Proceedings*

On December 16, 1964, the NLRB issued its decision. The jurisdiction of the Court of Appeals was invoked by the Company's petition to review said decision and order and by the Board's cross-application for enforcement thereof made pursuant to Sections 10(f) and 10(e) of the Act, respectively. Almost two years were then consumed in litigation (taken twice to this Court) concerning the status (as party or intervenor) of the International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter "the Union" or "IUE") in the court below. This litigation was concluded on October 17, 1966, when this Court denied the Union's petition for certiorari from a decision holding it to be an intervenor. *N.L.R.B.* v. *General Electric Co.*, 358 F.2d 292 (2d Cir. 1966), *cert. denied,*

385 U.S. 898. On October 28, 1969, the court below issued its decision enforcing the order of the NLRB. The Company then filed a petition for rehearing in banc which was denied on December 2, 1969. On the same date the court below rendered and entered its judgment in this case. Thereafter, on December 23, 1969, it stayed issuance of its mandate pending the timely filing of this petition and the disposition thereof by this Court.

B. *The Facts*

1. Collective Bargaining Relationship of the Parties

The case now before this Court arose out of the 1960 collective bargaining negotiations between GE and IUE. These negotiations marked the tenth year of bargaining relationship between the parties and resulted in a signed agreement. It was their seventh national agreement. This agreement (G.C. Exh. 6(G)), incorporating substantial increases in wages and fringe benefits, was reached after three months of intensive negotiations during which a three-week strike occurred. The only previous company-wide strike had occurred fourteen years prior and it did not involve IUE.

2. GE's Approach to Collective Bargaining

The Company's approach to collective bargaining was composed essentially of three elements (App. C 37-42):

(a) On the basis of prior negotiations with the Union and of its own research, it presented during bargaining an offer (described by it as a fair, firm offer) which included everything it felt was warranted and right, holding back nothing intentionally for later trading.

(b) It made known its willingness to change this offer only when further discussion, changing conditions or the uncovering of new facts indicated that its offer fell short of being right.

(c) It made the foregoing policy known to all of its employees through employer-employee communications which were part of a regular system of year-round communications designed to keep employees at all levels informed on a variety of subjects (some related and others unrelated to collective bargaining) of mutual interest to them and the Company. The purpose of the communications on the Company's bargaining policy was to explain the basis therefor and its reasons for adhering thereto.

3. The 1960 Negotiations

Formal negotiations between the parties opened on July 19, 1960. Although the contract did not require negotiations before the middle of August, the Company agreed to a Union request for an early start.

The parties held 45 meetings over a period of three months. The ebb and flow of their negotiations during those months were recorded (albeit not verbatim) in approximately 1500 pages of negotiations minutes. These minutes were received in evidence as G.C. Exh. 2B and provide a chronicle of the bargaining.

Neither the Board's trial examiner, the Board itself, nor the court below found that the totality of the Company's actual conduct at the bargaining table constituted in itself overall bad faith.

We will limit ourselves to a brief summary of some highlights of the bargaining.

(a) Informal Prenegotiations Meetings

At least four informal meetings were held between January and June, 1960. They were devoted primarily to defining and agreeing upon the information to be supplied by the Company for use by the Union in its preparations for and conduct of the forthcoming negotiations.

A fifth prenegotiations meeting was held on June 13, 1960, with the Company's consent, to give the Union an opportunity to present its demands in advance of the commencement of negotiations.

(b) Early Negotiations—July 19-August 11

The Union requested an early start to formal negotiations—earlier than the contract provided. The Company acceded to this request, suggesting that they start about a month ahead of time and that these early negotiations be devoted to the subject of employment security—a subject to which the Union had assigned top priority.

No agreement was reached on employment security before the time fixed by contract (August 16) for commencement of general negotiations and they began as contemplated by the contract.

(c) General Negotiations

(1) *August 16-29*

The next six meetings, all held during this period, were devoted to discussion and argument concerning the Union's demands.

(2) *The Company's Offer of August 29-30 and the Changes Made Therein*

On August 29, GE representatives, at their suggestion, met with top Union officials to give the latter an informal preview of the offer the Company was about to make formally the next day (App. C 88). After hearing it, the Union immediately announced its opposition to the offer (App. C 91), and flatly turned it down the next day when it was formally made at the bargaining table (App. C 217).

The uncontradicted testimony in the record established that the offer of August 30 was not put into final form until August 27, 1960, and the Board so found (App. C 81 & n. 23). Thus, GE did not enter negotiations with a pre-formulated offer but formulated and made its offer only *after* some six weeks of negotiations had taken place.

The offer embodied substantial improvements in the areas of wages, employment security and fringe benefits, as well as Union-assisting provisions in the fields of checkoff, leaves of absence for Union representatives and stewards and pension plan for Union representatives (App. C 88-91).

After the preview and formal submission of its offer to the Union the Company apprised its employees of the terms thereof on August 31. The Union had vigorously opposed this communication by the Company and, as we shall see, the Company was chastised both by the Board and the majority of the court below for refusing to be silenced by the Union's objections.

With the Company's offer on the table, negotiations continued until September 9, 1960, when they were suspended because of an IUE Convention.

Several changes were made in the Company's offer during this period. Although the lead opinion depreciated the significance of the several changes made in the Company's offer (compare A. 12, 44 and n. 13 with App. A 67-68), it is undisputed that all of the changes were in fact made, and (with a single exception) made *after* it had publicized its original offer (App. A 67).[5]

(3) *The Remainder of the Negotiations, the Strike and the Settlement*

On September 20 the negotiations resumed. On September 21 two months had elapsed since the beginning of bargaining, and the Company's offer had been on the table and the subject of active negotiations for three weeks, including eight separate day-long bargaining sessions. The Company confirmed formally on that day what it had mentioned on September 20, namely, that its full offer was on the table and there was no more to come (App. C 68). Actually, several changes had been made in the offer before September 20 and others were made after that date (App. C 68 n. 17). GE, at this time, also authorized its general managers to put into effect for non-represented employees wages and benefits contained in its offer.

On October 2, 1960, the Union struck, but negotiations continued under the auspices of the Federal Mediation and Conciliation Service. Between October 19 and October 22

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[5] The lead opinion characterized this offer as a "take-it-or-leave-it" offer. This pejorative label was never defined (App. A 65-66). The Board had not described the Company's offer in these terms. Its trial examiner had found (App. C 40) that "contrary to the assertion of the General Counsel, GE does not initially present its offer on an avowed 'take-it-or-leave-it basis' " and, in undeniable fact, the Union neither took the offer as made nor left it. It negotiated for and obtained material modifications therein.

negotiations for a strike settlement took place, and on October 22 a short form settlement agreement was signed and the strike ended thereafter (App. C 69).

Meetings were held between October 27 and November 23 for language drafting and to settle items theretofore left open (*ibid.*).

On November 10, a new three-year agreement was signed (*ibid.*).

4. Communications to Employees

The Company follows a year-round practice of communicating with its employees at all levels on a variety of subjects which are of common interest to them as well as to the Company. During periods of collective bargaining, events connected therewith are especially stressed.

The bargaining-connected communications on which the court below relied for its finding of illegality were primarily concerned with three of the Company views emphasized in its communications program. One was that, by Company policy, when it made an offer, that offer was described as "a fair, firm offer" with nothing intentionally held back for trading; another was that the Company would not yield concessions or offer more than it felt was prudent because of a strike or threat of strike.[6] A third, made about September 21, 1960 (two months after bargaining started), was that the Company had gone as far as it could and that its final offer was now on the table, with no more to come.

[6] But, as found by the Board and court below, GE stated that it is willing to make prompt adjustments in its offer whenever new information or a change in facts indicated that its initial offer fell short of being right (App. C 40, 6; App. A 7, 67, 74).

Although the Company communicated to its employees on many other aspects of the negotiations, it was essentially and basically the communications on these three subjects (App. A 46) which were condemned by the court below as having painted the Company "into a corner on *all* bargainable matters" (App. A 52)[7] and (in the words of the concurring opinion) as having comprised the "dominant wrong" (App. A 56).[8]

The Reasons for Granting a Writ

This petition seeks review by this Court of a finding of overall bad faith in bargaining by the Company and of two *per se* violations of Sections 8(a)(5) and 8(a)(1) of the Act. The reasons for granting review of the latter are set forth at pages 32-37, *infra*, where it is shown that each of them presents conflicts of widespread significance with

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[7] The lead opinion's view that the Company's communications acted as a restraint on its ability to make concessions is at odds with observations elsewhere in the same opinion which indicate that changes were actually made in the original offer and that all but one of these changes were made *after* the offer was publicized (App. A 12, 44 and n. 13; see also App. A 67-68).

[8] Other aspects of the Company's communications, which the Board described as "disparaging or discrediting" the Union, as exerting pressure on the Union "to submit to the will of the employer," and as creating the impression that "the employer rather than the union is the true protector of the employees' interests" (App. C 5), were emphasized by the Board but not stressed by the majority of the court below. On their face and for the reasons set forth in the dissenting opinion (App. A 69-70), the communications so described fell squarely within the protection of Section 8(c) of the Act.

It should be further noted, as found by the Board's trial examiner, that GE did not seek to conclude agreements with its employees or to displace the Union as the contracting party, but merely to influence employees to bring pressure on their leaders to accept a Company offer (App. C 227, 231).

the existing body of federal law governing labor-management relations.

The key factors relied on to support the central finding of overall bad faith in this case make the decision of unique significance.[9] It marks another in a series of resurgent attempts by the National Labor Relations Board to assume the role of regulatory agency over the substance of bargaining and over the sufficiency of concessions made therein. The decisions of this Court have consistently denied the existence of this power and Congress felt it necessary in 1947 to make this denial explicit by the enactment of Section 8(d) of the Act.

But the Board here did not stop with forbidden intervention into the bargaining process. It extended its reach into the area of free speech where, in defiance of the First Amendment to the Constitution and of Section 8(c) of the Act, it undertook to regulate and condemn the volume and content of the employer's communications to its employees —not because they contained threats or promises of benefit, but because they conveyed a policy of firmness in bargaining of which the Board disapproved.

The host of conflicts which this decision has created with the entire body of constitutional, statutory and case law (laid down by this Court and by Courts of Appeals) may readily be discerned from the following circumstances.

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[9] As noted in the BNA "Labor Relations Reporter" of November 3, 1969 (72 Analysis 37): "The General Electric case was the *first*, however, in which the National Labor Relations Board sought to deal with an entire approach to bargaining" (emphasis ours). Its uniqueness and importance in the field of labor-management relations is underscored by the fact that the Board's decision in this case and that of its trial examiner have been the subject of at least twenty law review articles.

This Company genuinely desired to reach agreement with the Union and the fact was so found (App. C 207). Moreover, an agreement was reached after three months of negotiations during which the parties met and discussed each other's demands and proposals (G.C. Exh. 2B; App. C 67-69). The pre-existing ten-year relationship between the parties was thereby confirmed and continued.[10] Thus was the traditional test for good faith met by petitioner in this case.

The principal holding of the lead opinion below in support of the Board's conclusion of bad faith, despite these facts, was that the combining of the Company's fair, firm offer approach with its wide publication thereof impermissibly inhibited its ability or freedom to make further concessions[11] beyond those included in its initial offer (App. A 53). By so doing, it approved the Board's reentry into the repeatedly forbidden realm of "sit(ting) in judgment upon the substantive terms of collective bargaining agreements." *N.L.R.B.* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). By the same token, it nullified the effective force of the First Amendment and of Sections 8(c) and 8(d) of the Act as *independent assurances* to employers and unions alike, of freedom to bargain for one's own terms and freedom to express one's own views, opinions and arguments during the course thereof.

The unsettling effects of this decision and its widespread importance to the entire field of management and labor, we submit, argue forcefully for review by this Court.

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[10] Ten more years (and three agreements) have since elapsed and the Union represents more of the Company's employees than it ever did.

[11] As we have already seen (*supra* pp. 9, 11 n. 7), the factual fallacy in its conclusion was established by the changes *actually made* by the Company.

1. The decision of the Court below is in basic conflict with Section 8(d) of the Act, and with decisions of this Court and of other Courts of Appeals, and casts into doubt and uncertainty the requirements of the duty to bargain.

(a) Requirements of Good Faith Bargaining

This Court, in *N.L.R.B.* v. *Insurance Agents' Int'l Union, AFL-CIO,* 361 U.S. 477, 488-89, enunciated the nature of the duty to bargain as well as the permissible scope of the Board's inquiry into its performance:

> "It is apparent from the legislative history of the whole Act that the policy of Congress is to *impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement,* in the belief that such an approach from both sides of the table promotes the overall design of achieving industrial peace. See National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45. Discussion conducted under *that standard of good faith* may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement, through give and take. . . . *But apart from this essential standard of conduct, Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.*" (Emphasis ours.)[12]

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[12] See, confirming this standard, address by the then Board General Counsel, Stuart Rothman, Negotiators Seminar, American Newspaper Publishers Ass'n, Chicago, Illinois, Oct. 27, 1960, *The Duty to Bargain in a Non-Compulsory Society* (pp. 2, 6):

> "The application of *the 'good faith' standard* . . . in the main . . . calls for an evaluation of the parties' subjective state of

The decision below materially altered and basically changed this standard and its scope by the addition to it of a new dimension. Thus, petitioner—in conflict with established authority[13]—was condemned not for negotiat-

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mind. That is, *the question sought to be answered is whether the parties have negotiated with a sincere desire to reach an agreement.*" (Emphasis ours.)

In this regard the lead opinion (App. A 49-50 n. 17) assertedly saw no basis for disagreement with the portion of the dissenting opinion in *United Steelworkers of America* v. *N.L.R.B.*, 390 F.2d 846 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 904 (1968), which found as "novel and internally inconsistent" the "proposition that a bargainer can be found to have refused to bargain in good faith even while at the same time it is found to have engaged in bargaining in a good faith effort to reach an agreement and has actually reached a final and binding contract." Its ultimate conclusions and the standards of good faith bargaining it actually applied, however, cannot be reconciled with this view of the boundaries of the duty to bargain.

[13] See, in addition, *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953); *ITU Local 38* v. *N.L.R.B.*, 278 F.2d 6, 11 (1st Cir. 1960); *Tower Hosiery Mills, Inc.*, 81 NLRB 658, 660 (1949), *enf'd*, 180 F.2d 701 (4th Cir.), *cert. denied*, 340 U.S. 811 (1950); *N.L.R.B.* v. *I.B.S. Mfg. Co.*, 210 F.2d 634, 638 (5th Cir. 1954); *N.L.R.B.* v. *United Clay Mines Corp.*, 219 F.2d 120, 125 (6th Cir. 1955); *Continental Oil Co.* v. *N.L.R.B.*, 113 F.2d 473, 481 (10th Cir. 1940), *modified and remanded on other grounds*, 313 U.S. 212 (1941). Typical of the pronouncements of these cases is that of the First Circuit in the *Reed & Prince* case, 205 F.2d at 134:

"... [T]he question is whether it is to be inferred from the totality of the employer's conduct that it went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union."

And see, Cooper, *Boulwareism and the Duty to Bargain in Good Faith*, 20 RUTGERS L. REV. 653, 673 (1966):

"The Board's opinion in the *General Electric* case may be a considerable departure from previous case law. It appears that the Board decided that the desire to reach an agreement

ing without a genuine desire for agreement, but for pursuing a policy which the lead opinion saw as having inhibited greater concessions than those actually made.[14]

(b) "Predetermined Resolve"

Principal reliance of the lead opinion below for this condemnation was predicated on dictum in the concurring opinion in *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149, 154-55 (1956),[15] to the effect that "a predetermined resolve not to budge from an initial position" is inconsistent with good faith. Its interpretation of that dictum rested on the apparent belief that a sincere desire to reach agreement, in these circumstances, was immaterial.

Until now, however, where the parties have actually met, conferred and negotiated, the Board and the courts have condemned such a predetermined resolve *only* if it was indicative of an intent to frustrate agreement. See, *e.g.*, *Division 1142 Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees* v. *N.L.R.B.*, 294 F.2d 264 (D.C. Cir. 1961); *Continental Oil Co.* v. *N.L.R.B.*, *supra* note 13; *Inter-Mountain Dairymen, Inc.*, 157 NLRB 1590,

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is no longer a defense to the charge of a failure to bargain in good faith."

[14] See, *e.g.*, lead opinion (App. A 46):

"The most telling effect of GE's marketing campaign was not on the Union, but on GE itself. Having told its employees that it had made a 'firm, fair offer,' that there was 'nothing more to come,' and that it would not change its position in the face of 'threats' or a strike, GE had in effect rested all on the expectation that it could institute its offer *without significant modification.*" (Emphasis ours.)

[15] App. A 51-52; but see, in this regard, dissenting opinion below App. A 65-66.

1606 (1966); *Memorial Consultants, Inc.*, 153 NLRB 1, 15 (1965); *Specialty Container Corp.*, 171 NLRB No. 6 (1968) (dissenting opinion).[16] Indeed, where no intent to frustrate agreement exists, this Court repeatedly has recognized that the degree of a bargainer's resolve before entry into and during bargaining is for him alone to decide. See, *United States* v. *American Shipbuilding Co.*, 380 U.S. 300, 309 (1965); *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965); and see, *N.L.R.B.* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *N.L.R.B.* v. *Insurance Agents' Int'l Union, AFL-CIO*, 361 U.S. at 485-89; *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).[17]

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[16] See also, *Philip-Carey Mfg. Co.*, 140 NLRB 1103 (1963), *rev'd in part*, 331 F.2d 720 (6th Cir. 1964), *cert. denied*, 379 U.S. 888 (1964); *Frick Co.*, 161 NLRB 1089, 1105-06 (1966).

[17] Note, in this connection, the lead opinion's adoption of a "mutually satisfactory accord" standard (App. A 42, 45-46) and its interpretation of "a serious effort to resolve differences and reach a common ground" (App. A 51). "Common ground," in the context of the cases cited in the accompanying text, has not been construed as a middle point or some other point equally "satisfactory" to both parties. If it were so construed, the NLRB's conversion into a regulatory agency over the terms of contracts would become a *fait accompli* in direct contravention of the mandate of the statute which created it and of the interpretations placed thereon by this Court.

Rather, common ground is the point at which the parties agree. Where a union imposes area standards in bargaining, for example, "common ground" is not a "mutually satisfactory" point, but rather the pattern point which the union previously determined elsewhere, *i.e.*, the point from which the union, when it entered negotiations, was predetermined not to budge. (See pp. 23-25 *infra*.)

As stated in Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1416 (1958)—cited with approval by this Court in the *Insurance Agents'* case, 361 U.S. at 489-90:

> ". . . The employer (or union) must engage in negotiations with a sincere desire to reach an agreement and must make an earnest effort to reach a common ground, but it need make no concessions and may reject any terms it deems unacceptable."

The failure of the lead opinion below to recognize this principle also runs counter to the admonition of this Court in *N.L.R.B.* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952):[18]

> " . . . [I]t is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (Footnotes omitted.)

Indeed, in this regard, the inconsistencies within the lead opinion itself, and as between it and the concurring opinion, point up the multiplicity of problems created by the departures in this case from the established standard. Thus, the lead opinion denied any intent to require "auction bargaining," preclude the "best offer first" bargaining technique, or compel the making of "concessions, 'minor' or otherwise" (App. A 52-53). Then, downgrading the concessions that were made, it proscribed as inconsistent with good faith a predetermined resolve not to yield. Yet a "best offer first" technique—which the majority expressly did not forbid—can only stem from a predetermined resolve to lay on the table all that a party intends to yield. The lead opinion, in short, is internally irreconcilable. It is also irreconcilable, on this point, with the concurring opinion's statement (App. A 55):

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[18] And to the pronouncements in *e.g.*, *ITU Local 38* v. *N.L.R.B.*, *supra* note 13; *Cutler* v. *N.L.R.B.*, 395 F.2d 287, 290 (2d Cir. 1968); *N.L.R.B.* v. *Herman Sausage Co., Inc.*, 275 F.2d 229, 231 (5th Cir. 1960). See also, Board concurring opinion (App. C. 11).

"We recognize that a company is entitled to insist on the terms of its original offer if it believes that the union can be made to accept that offer."

(c) The *Katz* Case

Citing the *Katz* case,[19] and the *Katz* case alone, the lead opinion holds that petitioner, by its overall conduct, refused to bargain "in fact" (App. A 53). The *Katz* standard is inapposite and, as applied herein, creates an open conflict with the *Insurance Agents'* case, *supra.*

In *Katz,* the employer *unilaterally* placed into effect certain employee benefits then under discussion with the union during negotiations. 369 U.S. at 737. Its conduct was held to be tantamount to an absolute refusal "even to negotiate *in fact*—'to meet . . . and confer.'" *Id.* at 743. Accordingly, the Court there held (*id.* at 742-43) there was "no occasion to consider the issue of good faith."

Under the decisions of this Court the determination of good faith, on the basis of totality of conduct, has been governed by the standard enunciated in such cases as *Insurance Agents', supra.* To evaluate totality of conduct, as was done here, on the basis of a decision whose facts made such evaluation unnecessary, not only misapplies *Katz* but sets it up as a precedent for totality of conduct cases in conflict with the authorities alone established to govern such cases. See, *e.g., N.L.R.B.* v. *Insurance Agents' Int'l Union, AFL-CIO,* 361 U.S. at 488-89.

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[19] *N.L.R.B.* v. *Katz,* 369 U.S. 736 (1962).

(d) "Take-It-or-Leave-It"

The lead opinion affixed the label of "take-it-or-leave-it" to petitioner's approach to bargaining (App. A 53). As noted above, note 5 *supra*, use of the label was unsupported by the record. And, as made clear in the *Insurance Agents'* case, it was unsupported in law.

Thus, this Court, in *Insurance Agents'*, defined the term "take-it-or-leave-it" bargaining as the antithesis of bargaining with "a desire to reach ultimate agreement, to enter into a collective bargaining contract." 361 U.S. at 485.[20]

As observed by the dissent below (App. A 65-66):

> "While the lead opinion makes much use of the 'take-it-or-leave-it' phrase, it never defines this. I should suppose it meant a resolve to adhere to a position without even listening to and considering the views of the other side. To go further and say that a party, whether em-

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[20] Legislative history and decisions of the courts and the Board itself confirm this definition. See, *e.g.*, remarks of Senator Pepper, 93 Cong. Rec. 4493, II Legislative History of the Labor Management Relations Act, 1947, 1172-73:

> "[W]hen any party to a dispute merely takes an adamant position, refuses to hear argument or to consider merit, marches in and throws something down, sits down in a chair and freezes up, and says, 'Take-it-or-leave-it,' that is not collective bargaining. . . ."

And see the remarks of Senator Ellender, 93 Cong. Rec. 4135, cited by this Court in the *Insurance Agents'* case, 361 U.S. at 487 n. 13.

See also *ITU Local 38* v. *N.L.R.B.*, *supra* note 13; and see, *e.g.*, *Memorial Consultants, Inc.*, 153 NLRB 1 (1965), and *Inter-Mountain Dairymen, Inc.*, 157 NLRB 1590 (1966), where the Board, adopting in whole the trial examiners' decisions therein, equated "take-it-or-leave-it" with, respectively, a refusal to "bargain with the purpose of coming to an agreement" (153 NLRB at 15) and a "covert determination to forestall a contractual consensus" (157 NLRB at 1606).

ployer or union, who, after listening to and considering such proposals, violates §8(a)(5) if he rejects them because of confidence in his own bargaining power, would ignore the explicit command of §8(d)—as Judge Waterman recognizes. . . .

"It must be equally true that an employer is not to be condemned for 'take-it-or-leave-it' bargaining when, after discussing the union's proposals and supporting arguments, he formulates what he considers a sufficiently attractive offer and refuses to alter it unless convinced an alteration is 'right'." [21]

(e) "Unable to Alter a Position Once Taken"

The crux of the majority's holding is that the purpose or necessary effect of petitioner's conduct was to place petitioner in such a frozen state that it was "unable to alter a position once taken" (App. A 53-54).[22] Insofar as this concept was predicated on petitioner's policy of implementing certain benefits for non-union employees prior to the completion of negotiations with the unionized em-

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[21] See, Cooper, *Boulwareism and the Duty to Bargain in Good Faith, supra* note 13, commenting on this aspect of the case at bar:

"Previous cases have condemned take-it-or-leave-it bargaining, but only on a showing that the employer had no desire to reach an agreement.[89] This is a significant change in the law. . . ."

"[89] See Note, 76 HARV. L. REV. 807, 811 n. 38 and accompanying text (1963)."

[22] As stated by the concurring opinion (App. A 55):

". . . [P]ublicity regarding firmness tends to make the company seal itself into its original position in such a way that, even if it wished to change that position at a later date, its pride and reputation for truthfulness are so at stake that it cannot do so."

ployees,[23] it has been expressly rejected by the Court of Appeals for the Fifth Circuit in *Texas Foundries, Inc.* v. *N.L.R.B.*, 211 F.2d 791 (1954), setting aside 101 NLRB 1642, and with the Board's own decision in *McCulloch Corp.*, 132 NLRB 201 (1961).[24]

In *Texas Foundries*, the Fifth Circuit set aside the following holding of the trial examiner,[25] adopted in whole by the Board (101 NLRB at 1666, 1668):

> ". . . [The employer] determined in advance of negotiations to *announce* . . . [its wage] increase simultaneously with its offer to the Union as immediately effective for nonunit employees. . . . [A]s the Respondent admittedly knew, and inferentially intended, the practical effect of converting its proposal to the Union into an accomplished fact for nonunit employees was to freeze solidly its bargaining position with the Union. Stated differently, the Respondent knowingly precluded

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[23] See lead opinion (App. A 47 n. 15).

[24] See also *Philip-Carey Mfg. Co.*, *supra* note 16, where the Board reversed a similar holding by the trial examiner (140 NLRB at 1104) that the employer unlawfully had "locked" itself into "a policy [which] necessarily envisaged no further concessions, no matter how protracted the bargaining or how persuasive the arguments for concessions advanced by the Union" (*id.* at 1121). There, unlike here, the employer's first offer was presented as its "final" offer. There, unlike here, the employer did not deviate from that offer as to any matter deemed objectionable by the union; the only deviation was a "minor deviation" on a "nonmonetary" issue (*id.* at 1105, 1115, 1121-22). And there, unlike here, the only concessions made occurred *before* the employer presented its offer and pertained only to "a few issues," notably the first-contract establishment of a grievance and arbitration procedure and the "narrow[ing]" of the area of disagreement with respect to "some minor matters" (*id.* at 1114).

[25] The same trial examiner as in the case at bar.

itself, in light of its *stated policy,* from thereafter seriously considering compromises of the Union's fringe demands on a give and take basis. . . .

". . . [A]n employer, faced with a choice, may not wilfully preclude himself from genuine collective bargaining with the legal representatives of the organized group, by taking action with regard to the unorganized employees, *the purpose or necessary effect of which he knows will freeze his stand in his negotiations with the legal representative of the organized group.*" (Emphasis ours.)

In setting aside the Board's decision in *Texas Foundries,* the Fifth Circuit rejected and discredited the very theory upon which the Board, with approval of the Second Circuit, here relied.

(f) Area Standards or Pattern Bargaining

Parties to collective negotiations, due to their public or bargaining table "commitments," often have been no less "frozen" or "locked" into a position than was petitioner. Perhaps, the clearest example is that involving area standards or pattern bargaining[26]—recognized as valid by this

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[26] Defined as follows in Anker, *Pattern Bargaining, Antitrust Laws and the National Labor Relations Act,* NEW YORK UNIV. NINETEENTH ANNUAL CONF. ON LABOR, pp. 81-82 (1967):

". . . [U]nions and employers have shown increasing interest in bargaining techniques which will produce uniformity in terms and conditions of employment . . . . When a union, having negotiated an agreement at one unit, or with one employer, seeks to obtain the same agreement in other units or from other employers, it is engaging in one form of 'pattern bargaining,' perhaps the most familiar one. Employers, of course, often engage in the same kind of pattern bargaining. . . ."

Court in *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965).

In conflict with the *Pennington* case, and without ever attempting reconciliation therewith or with the widespread practice it endorses as valid, the lead opinion below stated (App. A. 47):

> "The Company, having created a view of the bargaining process that admitted of no compromise was trapped by its own creation. It could no longer seek peace without total victory, because it had by its own words and actions branded any compromise a defeat." [27]

As recognized by the dissent below (App. A. 67), the decision herein

> ". . . would seemingly outlaw practices that no one has considered illegal up to this time. A union that has won a favorable contract from one employer and has broadcast that it will take no less from others seems to me to be quite as 'unable to alter a position once taken' as GE was here, yet I should not have supposed this violated the Act. So also with an employer who has negotiated a contract with one union and has proclaimed that he will do no better for others. To say that taking such positions violates §§8(b)(3) or 8(a)(5) is steering a collision course with §8(d)." [28]

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[27] Compare Forkosch, *"Take It Or Leave It" as a Bargaining Technique*, 3 CALIF. W. L. REV. 43, 55 (1967):

> "When an 'area standard' contract is presented to the employer . . . if there is any breakthrough for one employer or in one respect then all others seek it and chaos results."

[28] See, also, concurring Board opinion (App. C 12-13); and see, in this regard, a recent decision of the Trial Examiner Ivar Peterson in *IBEW and Phil Sears Electric Service*, TXD-712-69, Case No. 9-CB-1445 (released January 2, 1970), holding illegal a union's attempt to impose an area standards contract, explicitly on the basis of the precedent established in this case.

This Court has recognized that, in the end, it is not the announced posture of the parties but rather their relative bargaining strengths which determines whether and to what extent they will yield. See, *e.g., United Mine Workers* v. *Pennington,* 381 U.S. at 668; *N.L.R.B.* v. *Insurance Agents' Int'l Union,* 361 U.S. at 489, 495; *American Shipbuilding Co.* v. *N.L.R.B.,* 380 U.S. 300, 309 (1965); *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 181 (1967); *Scofield* v. *N.L.R.B.,* 394 U.S. 423, 432 (1969).[29] As best expressed in the *Pennington* case, 381 U.S. at 668, in each case a party must

> "... assess ... the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective ... should temporarily give way."

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[29] See, also, *Cutler* v. *N.L.R.B., supra* note 18. There, the union, prior to negotiations, unilaterally amended its minimum wage scale and welfare plan by-laws. These amended by-laws constituted the union's demands. Union members working for anything less than the amounts prescribed by the by-laws were threatened with fines. It is hard to imagine how the union there could have been any less wedded to its position than was petitioner herein. Yet, as stated by the court, 395 F.2d at 290:

> "Whether ... [the employer] would have to meet these demands would depend upon the *relative bargaining power of the parties.* Concededly, in the present case, the bargaining power of ... [the union] so greatly exceeded that of ... [the employer] that *he would be almost compelled to accede to most of the union's demands.* But it is no violation of the Act for a labor organization to be economically powerful.[9] ...
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> "[9] As the Supreme Court has said, '(t)he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.' NLRB v. Insurance Agents' Int'l Union, supra at 489."

2. The holding below with respect to petitioner's communications is in conflict with the free speech guarantee of the First Amendment to the Constitution, Section 8(c) of the Act, the decisions of this Court, the decisions of the vast majority of Courts of Appeals and other decisions of the Second Circuit Court of Appeals.

Petitioner's communications have been treated by the Board and the majority below not merely as evidence of an unfair practice but as part and parcel of the unfair practice itself.[30]

The question here presented for review, therefore, is whether—the First Amendment and Section 8(c) of the Act to the contrary notwithstanding—the National Labor Relations Board may regulate such communications, curtail their volume or shut them off entirely solely because they emphasize a policy of firmness in bargaining of which the Board disapproves.

The importance of review by this Court is emphasized by the circumstance that the censorship imposed by the decision below is not expressed in a form which fixes its limits. On the contrary, an imposed limitation on the free communication of a policy of firmness in bargaining, al-

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[30] "We hold that an employer may not so combine 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken" [per Kaufman, J., App. A 53; see note 5 *supra*, showing the inappropriateness of the label "take-it-or-leave-it."].

"A company may make a firm, fair offer to the union and may stand by that offer, but the company should not be permitted to advertise to its employees that it believes in the firmness of its offers for the sake of firmness.

". . . What makes these practices unfair is GE's 'widely publicized stance of unbending firmness,' that is, GE's communication to its employees that firmness was one of the company's independent policies" [per Waterman, J., App. A 55].

though expressed in the opinions of the Board and in the opinions of the two judges of the Court of Appeals who made up its majority (note 30 *supra*)[31] is not expressed at all in the order of the Board which the court has enforced.[32] Its scope lies undefined in an order (App. C 258) couched in conventional and uninformative language enjoining the Company from refusing to bargain in good faith.

Prior to the passage of Section 8(c) of the Act, this Court, in a landmark opinion (*Thomas* v. *Collins*, 323 U.S. 516, 532 (1945)), stated:

> "This Court has recognized that 'in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . .'"

And at 537-38:

> "Accordingly, decision here has recognized that employers' attempts to persuade to action with respect

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[31] All of these opinions, although to the same general effect, differ in various particulars.

[32] "In view of the general obscurity of what GE is and is not permitted to do, the Company could take little comfort from the majority's assurance that it will be given a full opportunity to show it has made a good faith effort at compliance before it is held in contempt" [per Friendly, J., App. A 75].

"But I am particularly disturbed by the treatment accorded Respondent's communications. . . . In areas such as this bordering on Section 8(c) of the Act and free speech, I believe that the Respondent is entitled to something more by way of clarification than the vague proscription implied in the general bargaining order. But I doubt if the facts and findings indicate what specific limitations can properly be laid down" [per Leedom, Board Opinion, App. C 20].

> to joining or not joining unions are within the First Amendment's guaranty . . . . Decisions of other courts have done likewise. When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed . . . . *But short of that limit the employer's freedom cannot be impaired.*" (Footnotes omitted, emphasis ours.)

In 1947, Congress enacted Section 8(c). Its passage manifested " . . . a congressional intent to encourage free debate on issues dividing labor and management." *Linn* v. *United Plant Guard Workers of America*, 383 U.S. 53, 62 (1966). As the Court stated (*ibid.*):

> " . . . [C]ases involving speech are to be considered 'against the background of a profound • • • commitment to the principle that debate • • • should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.' New York Times Co. v. Sullivan, 376 U.S. 254 [1964] . . . ."

The principle relied upon in the opinions of a number of Courts of Appeals is in direct conflict with that in the case at bar.[33] In *Coppus Eng'r Corp.* v. *N.L.R.B.*, 240 F.2d 564 (1st Cir. 1957) a company had been held to have violated Section 8(a)(2) of the Act by unlawfully assisting and interfering with the administration of a shop committee which was a labor organization within the meaning of the Act. The Board found the company's president had called

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[33] See also pp. 21-23 *supra*, wherein the basic conflict between the theory of "freezing" here relied on and the holding of the Fifth Circuit in a case rejecting that theory is discussed.

a meeting of employees shortly after an outside union lost an election at the plant and suggested "they have a permanent grievance committee, if that is what they wanted to call it." This led the Board, the court stated, to conclude that the president's statement resulted in the formation of "a labor organization which was the creature of management at inception, and which functioned in subservience to management after inception, contrary to §8(a)(1) and (2)" (*id.* at 571). The court in setting aside the Board's order said (*id.* at 570-71):

> "It is clear that the finding of an unfair labor practice cannot stand in the face of the First Amendment or of §8(c), if the employer's statement, upon which the finding is based, does not contain some threat of reprisal or force or promise of benefit. National Labor Relations Board v. Corning Glass Works, 1 Cir., 1953, 204 F.2d 422, 35 A.L.R.2d 408."

See also *N.L.R.B.* v. *Colvert Dairy Prods. Co.*, 317 F.2d 44 (1963), where the Tenth Circuit Court of Appeals said (at p. 46):

> "The Act (sec. 8(c)) specifically provides that privileged communications between employer and employee shall not be evidence of an unfair labor practice. To allow the privileged communications to become an instrument of destruction by indirection is to frustrate the right of free speech and the privilege of persuasion."[34]

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[34] To the same effect *N.L.R.B.* v. *Rockwell Mfg. Co. (DuBois Div.)*, 271 F.2d 109 (3rd Cir. 1959); *N.L.R.B.* v. *Threads, Inc.*, 308 F.2d 1 (4th Cir. 1962); *Southwire Co.* v. *N.L.R.B.*, 383 F.2d 235 (5th Cir. 1967); *Union Carbide Corp.* v. *N.L.R.B.*, 310 F.2d 844 (6th Cir. 1962); *Indiana Metal Prods. Corp.* v. *N.L.R.B.*, 202

Moreover, the decision in the case at bar conflicts with other decisions of the Second Circuit. See *N.L.R.B.* v. *River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967); *N.L.R.B.* v. *Golub Corp.*, 388 F.2d 921, 928 (2d Cir. 1967).[35]

In the words of the Second Circuit, "when the statute being enforced [e.g., Section 8(c)] approaches the limits of constitutional power . . . . the overriding principle of construction [requires] that [it] be read so as to avoid serious constitutional doubt . . . ." *N.L.R.B.* v. *Golub Corp.*, *supra* at 928.[36]

F.2d 613 (7th Cir. 1953), *cert. denied*, 346 U.S. 856; *Gem Int'l, Inc.* v. *N.L.R.B.*, 321 F.2d 626 (8th Cir. 1963); *N.L.R.B.* v. *Laars Eng'r, Inc.*, 332 F.2d 664 (9th Cir. 1964); *J. S. Dillon & Sons Stores Co., Inc.* v. *N.L.R.B.*, 338 F.2d 395 (10th Cir. 1964); *Amalgamated Clothing Workers* v. *N.L.R.B.*, 365 F.2d 898 (D.C. Cir. 1966); *Truck Drivers Local 728* v. *N.L.R.B.*, 364 F.2d 682 (D.C. Cir. 1966).

[35] The lead opinion offers in support of its unprecedented holding Senator Taft's statement that:

> "'It should be noted that this subsection is limited to "views, arguments or opinions, and does not cover instructions, directions; or other statements that would ordinarily be deemed relevant and admissible in courts of law." 1 Legislative History of the LMRA 1947, at 1541'"

and suggests that "the key word is 'relevant'" (App. A 48). But as the minority opinion correctly points out, "GE's communications fit snugly under the phrase 'views, argument or opinion' in § 8(c)" (App. A 70). Such communications do not fall under the exception which Senator Taft described (App. A 71). Here the Company's expression of its views was held not relevant to *proof* of violation but an *integral part* of the violation itself.

[36] Accordingly, Courts of Appeals for at least six other circuits have regarded it as "well settled" that a "narrow or strained construction" of the free speech provision is to be avoided. *N.L.R.B.* v. *Arkansas Grain Corp.*, 392 F.2d 161, 163-65 (8th Cir. 1968); see also *Coppus Eng'rg Corp.* v. *N.L.R.B.*, *supra* at 570-71; *Trailmobile Div. Pullman, Inc.* v. *N.L.R.B.*, 389 F.2d 195, 196 (5th Cir. 1968); *N.L.R.B.* v. *Mt. Vernon Tel. Corp.*, 352 F.2d 977, 979 (6th Cir. 1965); *Union Carbide Corp.* v. *N.L.R.B.*, *supra* note 34 at 845;

The Second Circuit's decision here also establishes another conflicting principle in this field of the law by creating a vague standard impossible to define and delimit by any objective measure. As stated by this Court in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-33 (1962):

> " . . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. *Marcus* v. *Search Warrant*, 367 U.S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter ~~their~~ exercise almost as potently as the actual application of sanctions. Cf. *Smith* v. *California, supra*, at 151-154; *Speiser* v. *Randall*, 357 U.S. 513, 526. *Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. Cantwell* v. *Connecticut*, 310 U.S. 296, 311." (Emphasis ours.)[37]

In the words of the dissent below (App. A 74):

> "It is doubtless true in labor as in other negotiations that the louder people shout, the harder it becomes for

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Indiana Metal Prods. Corp. v. *N.L.R.B., supra* note 34 at 617; *N.L.R.B.* v. *Howard Quarries, Inc.*, 362 F.2d 236, 239-40 (8th Cir. 1966); *Gem. Int'l Inc.* v. *N.L.R.B., supra* note 34 at 629; *N.L.R.B.* v. *Laars Eng'r, Inc., supra* note 34 at 667.

[37] See also, *U. S.* v. *Robel*, 389 U.S. 258, 266-67 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 512-13, 516 (1964); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963); *Winters* v. *New York*, 333 U.S. 507 (1948).

them to change their positions without unacceptable loss of face. In that sense any positive public declaration, whether by an employer or by a union, may run counter to the objective of securing industrial peace by promoting agreement. But the Board has been expressly prohibited from promoting peace by restricting speech. Conformably with the dictates of the First Amendment, Congress, when it enacted §8(c), determined the dangers that free expression might entail for successful bargaining were a lesser risk than to have the Board police employer or union speech."

3. The decision below on the personal accident insurance issue conflicts with a decision of this Court interpreting Section 8(d) of the Act and with decisions of the same and another Court of Appeals.

The Company on June 1, 1960, advised the Union by letter that it had completed arrangements for a personal accident insurance group policy under which *all* GE employees desiring to do so could participate, the full cost to be borne by participating employees (App. C 56; G.C. Exh. 3(72)). If the Union had no objection to making the insurance available to employees in its units, it would be made available to them as of July 1, in advance of their 1960 vacations—a period of relatively high outside-of-plant accident frequency. If, however, the Union desired to defer action, the insurance would still be available "at any later time the union desired" (*ibid.*). This insurance was to be *in addition* to that already provided under the existing collective bargaining agreement.

At the time the policy was offered (June 1, 1960), neither the time specified by law (Section 8(d)) nor that

specified in the contract for commencement of negotiations on the subject of insurance had arrived (App. C 57; R. Exh. 1, Section 4 of Title I—quoted in pertinent part at App. A 23 n. 4). Nevertheless, the Union demanded immediate and full negotiations thereon and proceeded to voice its various objections thereto (App. C 57-58).

The Company contested the bargainability of the matter *at that time* but assured the Union that it would not try to embarrass it by making capital of its rejection (App. C 59). The Board's trial examiner found that "GE kept faith" with this promise (App. C 59; see also G.C. Exh. 72(9)).

Although the Company had indicated that negotiations on this subject might become appropriate during the forthcoming general negotiations, the Union never raised the subject again (App. C 59).

Relying entirely on its decision in *Equitable Life Insurance Co.*, 133 NLRB 1675 (1961)—which had never previously been subjected to court review—the Board by a vote of 3-2 found that the foregoing facts constituted a *per se* violation of Section 8(a)(5) of the Act. The two dissenting Board members here relied on the reasoning of the dissent in *Equitable*—also decided by a 3-2 margin. The Board majority also used the personal accident insurance incident to support its finding of overall bad faith here.

The majority below upheld the Board on this issue (App. A 18-25) and relied heavily on it, as did the Board (App. C 8), for the conclusion of overall lack of good faith. Accordingly, as observed by the dissenting judge (App. A 59):

> "If this conclusion is wrong, as I think it to be, such an important element is removed from the 'totality of the circumstances' on which the Board relied that, on this ground alone, we could not properly enforce the order as to the overall bad faith." [38]

The majority's reliance (App. A 24) on this Court's decision in *N.L.R.B.* v. *Katz*, 369 U.S. 736 (1962), is clearly misplaced (see App. A 60). For there *during a period of bargaining* the employer *made three unilateral changes* in terms and conditions of employment, while here the Company merely *submitted a proposal* to the Union and did this *at a time when it had no duty to bargain at all.*

The decision below, we submit, is inconsistent in principle with the unanimous decision in another recent case of the same Court of Appeals, namely, *General Electric Co.* v. *N.L.R.B.*, 412 F.2d 512 (2d Cir. 1969). There the court expressly rejected the proposition that "anything that would be improper in the mandatory bargaining period must be so regarded at the earlier time . . . ." 412 F.2d at 521. It noted that conduct considered illegal during the mandatory bargaining period may be completely permissible before the bargaining period begins, and concluded (*ibid.*):

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[38] The inclusion of the personal accident insurance incident as part of the totality of circumstances showing bad faith was in itself incorrect, regardless of the correctness of the holding of independent violation. The incident was completely isolated from and unrelated to the events of the forthcoming negotiations. Moreover, based on the contract waiver and the state of the law at that time (*Equitable* was not decided until the following year), GE was at least reasonably justified in concluding on June 13, 1960, that its insurance proposal was not then a bargainable matter.

"The real point is that there is a difference between the two periods and that distinctions which are the stuff of the law, are called for."

The decision below also conflicts with this Court's own view of Section 8(d) of the Act in *N.L.R.B.* v. *Lion Oil Co.*, 352 U.S. 282 (1957). To hold, as it did, that the Union can require the Company to bargain about its personal accident insurance proposal is to say that the Union has a right to strike to support its demands with respect to that proposal. Giving a Union this right undermines and defeats the purposes of Section 8(d) of the Act insofar as that section was designed to prevent strikes during a contract's term.[39] This Court in *Lion Oil Co.* read Section 8(d) as forbidding strikes to enforce contract demands prior to the reopening or termination date of the contract.

It also conflicts with the decision of the Court of Appeals for the Ninth Circuit which held that a refusal during contract term to bargain on a matter removed from the scope of bargaining during that period does not violate Sections 8(a)(5) or 8(a)(1) of the Act. *N.L.R.B.* v. *Honolulu Star-Bulletin, Inc.*, 372 F.2d 691 (9th Cir. 1967).

The decision below if permitted to stand would discourage that freedom of discussion and suggestion during contract term and that freedom to offer new benefits, which in many cases have resulted in improved labor relations. It raises an important question of federal law on which an authoritative ruling of this Court would both end the conflicts described above and settle a matter of substantial import to the labor-management community.

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[39] See App. A 61; *Equitable Life Insurance Co., supra* (dissenting opinion).

4. The decision below raises a significant question of federal law which has not been, but should be, settled concerning the duty to furnish a union with estimates of the future costs of proposals made by an employer during collective bargaining negotiations.

This petition seeks review of the finding below of violation of Section 8(a)(5) of the Act for failure to furnish certain information comprising estimates of the future costs per employee of the insurance and pension benefits proposed by the Company during bargaining (see items A and B of September 22, 1960 letter, G.C. Exh. 3(40), quoted in full at App. A 29 n. 8).

It should be emphasized, that these were not "information" in the ordinarily accepted sense, but, rather, *predictions* or *estimates* as to the cost of still unaccepted Company proposals. Neither the duty to supply this type of information nor its relevancy to collective bargaining negotiations has been recognized by this Court.[40]

The view which the court below took of the duty to provide information during bargaining was not confined to the finding of *per se* violation on which certiorari is hereby

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[40] In *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), on which the court below relies, this Court carefully limited its holding so as to permit a union substantiating data only where the employer mechanically repeats an argument of inability to pay during bargaining. This Court cautioned that even there the duty to furnish data would not "automatically" follow, but would depend on the "circumstances of the particular case" (*id.* at 153-54).

It is undeniable in this case that GE did not resist Union demands by offering an argument of inability to pay. In fact, the Company declared in response to the Union's September 22 request for cost data that such data was speculative in nature, not relevant to the bargaining and that the Company was *"ready to pay whatever is necessary to implement the proposals we are putting on the table"* (G.C. Exh. 3(45), emphasis ours).

sought. It appears also from the court's observation—not based on any finding to this effect by the Labor Board—that bad faith could be inferred if an employer refused "to estimate not only the cost of components of its offer, but the total size of the wage-benefit package it would consider reasonable" (App. A 42).

Both the precise *per se* holding on the issue under discussion and the court's all but limitless assessment of the gauge of the duty to provide cost estimates at the penalty of being held in bad faith underscore, we submit, the importance of the question hereby raised and the desirability of its review by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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January 12, 1970

APPENDIX A

Opinions of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 337, 338—September Term, 1968.

(Argued June 3, 1969 Decided October 28, 1969.)

Docket Nos. 29502, 29576

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—against—

GENERAL ELECTRIC COMPANY,

Respondent,

—and—

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,

Intervenor.

Before:

WATERMAN, FRIENDLY and KAUFMAN,

Circuit Judges.

Petitions to review and to enforce order of the National Labor Relations Board based on findings of unfair labor practices and failure to bargain in good faith in violation

of sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1), (5). Order enforced.

EUGENE B. GRANOF, Washington, D. C. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Warren M. Davison, Eugene B. Granof, National Labor Relations Board, on the brief), *for petitioner.*

DAVID L. BENETAR, New York, N. Y. (David L. Benetar, Robert C. Isaacs, Michael I. Bernstein, Stanley Schair, Nordlinger, Riegelman, Benetar & Charney, New York, N. Y., on the brief), *for respondent.*

RUTH WEYAND, Washington, D. C. (Irving Abramson, Washington, D. C., on the brief), *for intervenor.*

KAUFMAN, *Circuit Judge:*

Almost ten years after the events that gave rise to this controversy, we are called upon to determine whether an employer may be guilty of bad faith bargaining, though he reaches an agreement with the union, albeit on the company's terms. We must also decide if the company committed three specific violations of the duty to bargain by failing to furnish information requested by the union, by attempting to deal separately with IUE locals, and by presenting a personal accident insurance program on a take-it-or-leave-it basis.

I.

The Prior Proceedings

In the wake of what it regarded as unsatisfactory negotiations with the General Electric Company (GE) during the summer and fall of 1960, the International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE) filed unfair labor practice charges with the National Labor Relations Board. The General Counsel, on April 12, 1961, filed a complaint alleging that GE had committed unfair labor practices in violation of sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1), 158(a)(3), and 158(a)(5) (1964). Hearings were held before a trial examiner between July, 1961, and January, 1963, and included testimony, oral argument, and submission of briefs. The Trial Examiner issued his Intermediate Report on April 1, 1963, which found GE guilty of several unfair labor practices. GE and the IUE filed exceptions to the Intermediate Report, and on December 16, 1964, the NLRB agreed with the Trial Examiner. 150 N.L.R.B. 192 (1964).

There followed the race to the courthouse that is an unhappy feature too often encountered in these matters. See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law,* 82 Harv. L. Rev. 542, 598-600 (1969). Since GE does business in every state, every court of appeals has jurisdiction, if GE's petition for review is first filed there. See 29 U.S.C. §160(f) (1964); 28 U.S.C. §2112 (1964). The IUE claimed that it filed in the District of Columbia Circuit 14 seconds before GE handed its petition to the clerk in

the Seventh Circuit. GE's version of course differed. The NLRB, admitting its confusion (not without reason, it would seem), suggested that since the question of timing was incapable of rational solution, the Second Circuit, where the unfair labor practices complained of occurred, would be the logical place to begin. The District of Columbia and Seventh Circuits agreed. *IUE* v. *NLRB,* 343 F. 2d 327 (D.C. Cir. 1965); *GE* v. *NLRB,* 58 LRRM 2694 (7th Cir. 1965). Another year was required to determine that the Union's proper status in the action was that of intervenor. *NLRB* v. *General Electric Co.,* 59 LRRM 2094, 2095 (2d Cir. 1965), *vacated and remanded, IUE* v. *NLRB,* 382 U.S. 366 (1966), *modified on remand, NLRB* v. *General Electric Co.,* 358 F. 2d 292 (2d Cir.), *cert. denied,* 385 U.S. 898 (1966). See *International Union, Local 283* v. *Scofield,* 332 U.S. 205 (1965).

In order for the action to reach its present state of ripeness, this court consolidated GE's petition for review (No. 29576) with the Board's petition for enforcement (No. 29502). *NLRB* v. *General Electric Co.,* 358 F. 2d 292 (2d Cir. 1966), *cert. denied,* 385 U.S. 898 (1966). Another year and a half passed while the parties attempted to settle the case without recourse to further litigation. When a satisfactory settlement proved too elusive, they reentered the fray with renewed vigor, undiminished by the passage of time, two successive collective bargaining contracts (1963 and 1966), and by another suit over proper representation arising out of the 1966 negotiations. *McLeod* v. *General Electric Co.,* 257 F. Supp. 690 (S.D.N.Y.), rev'd 366 F. 2d 847 (2d Cir. 1966), remanded 385 U.S. 533 (1967). See also *General Electric Co.* v. *NLRB,* No. 32867 (2d Cir., June 9, 1969).

II.

The Bargaining Background

General Electric, a New York corporation, is the largest and perhaps best known manufacturer of electrical equipment, appliances, and the like. Its products—manufactured in all the 50 states—range from refrigerators to atomic energy plants, from submarines to light bulbs. In 1960, it employed about 250,000 men and women; of these only 120,000 were unionized. The IUE is an international union, affiliated with the AFL-CIO, and had a total membership of about 300,000. In 1960 it represented some 70,000 of the 120,000 unionized GE employees, formally grouped in more than 105 bargaining units, and was far and away the largest single union with whom GE dealt. The next largest, the United Electrical Workers (UE), represented only 10,000 members, and the remaining 50,000 unionized employees were split among some 100-odd other unions or bargaining agents who dealt independently with GE. A high proportion of GE employees are supervisory or managerial personnel, who are available to the company in the event of a strike.

The present action has its roots deep in the history of prior negotiations and bargaining relationships. Before 1950, the major union was the UE. In 1946, negotiations reached an impasse and resulted in a serious and crippling strike. GE eventually capitulated, and agreed to a settlement that it later characterized as a "debacle," and beyond the company's ability to meet.

GE's response came in the form of a new approach to employee relations, urged by one of its vice presidents, Lemuel R. Boulware. Although GE generally objects to use of the term, describing it as a "hostile label," the tactic

of "Boulwareism" associated with his name soon became the hallmark of the company's entire attitude towards its employees.[1]

In many respects, GE's negotiating policy after the 1946 strike followed a predictable course. The Company had been concerned over the antipathy many of the employees displayed during the strike. It decided that it was no longer enough to act in a manner that it thought becoming for a "good" employer; it had to insure that the employees recognized and appreciated the Company's efforts in their behalf. The problem was perceived as a failure to apply GE's highly successful consumer product merchandising techniques to the employment relations field.

The new plan was threefold. GE began by soliciting comments from its local management personnel on the desires of the work force, and the type and level of benefits that they expected. These were then translated into specific proposals, and their cost and effectiveness researched, in order to formulate a "product" that would be attractive to the employees, and within the Company's means. The last step was the most important, most innovative, and most often criticized. GE took its "product"—now a series of fully-formed bargaining proposals—and "sold" it to its employees and the general public. Through a veritable avalanche of publicity, reaching awesome proportions prior

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1 Commentators are almost as widely split on the spelling of the term as they are over its merits. See, e.g., H. R. Northrup, *Boulwarism* (1964); Note, *Boulwareism: Legality and Effect*, 76 Harv. L. Rev. 807 (1963); Cooper, *Boulwarism and the Duty to Bargain in Good Faith*, 20 Rutgers L. Rev. 653 (1966); Gross, Cullen & Hanslowe, *Good Faith in Labor Negotiations: Tests and Remedies*, 53 Corn. L. Rev. 1009, 1025 (1968) ("Boulwarism"). We will follow the trial examiner in denominating the technique as "Boulwareism."

GE, while abjuring the use of the term Boulwareism, described its bargaining tactic in the early days as "the Boulware approach" in speeches to its supervisors.

to and during negotiations, GE sought to tell its side of the issues to its employees. It described its proposals as a "fair, firm offer," characteristic of its desire to "do right voluntarily," without the need for any union pressure or strike. In negotiations, GE announced that it would have nothing to do with the "blood-and-threat-and-thunder" approach, in which each side presented patently unreasonable demands, and finally chose a middle ground that both knew would be the probable outcome even before the beginning of the bargaining. The Company believed that such tactics diminished the company's credibility in the eyes of its employees, and at the same time appeared to give the union credit for wringing from the Company what it had been willing to offer all along. Henceforth GE would hold nothing back when it made its offer to the Union; it would take all the facts into consideration, and make that offer it thought right under all the circumstances. Though willing to accept Union suggestions based on facts the Company might have overlooked, once the basic outlines of the proposal had been set, the mere fact that the Union disagreed would be no ground for change. When GE said firm, it meant firm, and it denounced the traditional give and take of the so-called auction bargaining as "flea bitten eastern type of cunning and dishonest but pointless haggling."

To bring its position home to its employees, GE utilized a vast network of plant newspapers, bulletins, letters, television and radio announcements, and personal contacts through management personnel.

Side by side with its policies of "doing right voluntarily" through a "firm, fair offer," GE also pursued a policy of guaranteeing uniformity among unions, and between union and non-union employees. Thus all unions received substantially the same offer, and unrepresented employees

were assured that they would gain nothing through representation that they would not have had in any case. Prior to 1960, GE held up its proposed benefits for unrepresented employees until the unions agreed, or until the old contract with the Union expired.

The IUE split off from the UE in 1950, when the UE was expelled from the CIO for alleged Communist domination. Since 1950, the IUE and GE have bargained on a multi-unit basis, despite the presence of separate unit certifications for IUE locals. The pattern was continued in successive 1951, 1952, 1954, and 1955 renewal contracts. In practice, the IUE has dealt with the company through its General Electric Conference Board, composed of delegates elected from IUE locals. Under the Union constitution, the Conference Board may call strikes, make contract proposals, and conclude agreements, regardless of an individual local's consent. GE has dealt with, and recognized the status of, the Conference Board since 1950, although the national agreements frequently provided that some matters, usually minor, would be left to local agreement.

The 1955 Contract, which was to run for five years, contained a provision allowing the Union to reopen in 1958, solely on the issue of employment security. The union did so, but was unable either to gain concessions from the Company, or to elicit enough support for a strike.

III.

The 1960 Negotiations

Under the 1955 Contract, the earliest date that either party could compel the beginning of negotiations was August 16, 1960, 45 days before the end of the contract.

Both sides, however, were anxious to take at least some preliminary steps before they were required to.

The IUE set up a loose alliance with several other AFL-CIO unions who bargained with GE, and they jointly polled their members on proposals. Before the actual beginning of formal negotiations, the IUE also began preparing its members through information about some of the possible demands that appeared likely to be presented to GE.

Since the linchpin of the "Boulware approach" was to bring GE's side of the story home to its employees and to the general public, it began in the latter part of 1959 to advise its Employment Relations Managers of the subjects that they should be prepared to discuss with employees. This was effected through various media, including plant publications and personal contact. General arguments in favor of keeping GE competitive through low costs, and the advantage of receiving GE benefits without having to wait for Union officials to approve them, were among the suggestions presented.

Informal meetings were first held in January, 1960, and Union and Company subsequently joined in preparing a body of information. Neither side felt any inclination to complain of want of cooperation at this stage. GE, in fact, took pains to suggest alternate information when the precise form the Union desired was unavailable.

Before another planned informal meeting in June, 1960, GE notified the IUE by letter that as of July it would institute a contributory group accident and life insurance plan for all employees, but if the Union objected, only unrepresented employees would receive the benefits. The Union protested that the Company had to bargain before making such a unilateral change, but GE insisted that the 1955 IUE-GE Pension and Insurance agreement waived

all such requirements. The Union still objected, and the program was put into effect only for unrepresented employees.

At the June meeting, the Union stated its proposals, as they then stood. Without much discussion, other than some minor clarifications, Philip D. Moore, GE's Union Relations Service Manager and chief negotiator, called the proposals "astronomical" in cost, "ridiculous," and not designed for early settlement.

Following the presentation of these proposals, the early publicity phase of the Boulware approach swung into high gear. Employing virtually all media, from television and radio, to newspaper, plant publications and personal contact, the Company urged employees and the public to regard the Union demands as "astronomical" (then and later a favored Company term), and likely to cost many GE employees their jobs through increased foreign competition. GE, on the other hand, announced it would in time make a fair and "firm" offer that would give employees no reason to allow union leadership to impose a strike. The basic theme was that the Company, and not the Union, was the best guardian and protector of the employees' interests.

The IUE also tried its hand at publicity, including an "IUE Caravan" that travelled from city to city, and occasional articles in the International Union's newspaper. In scope and effectiveness, however, they were far outshadowed by the Company's massive campaign.

From July 19 to August 11, the Union presented its specific proposals on employment security, to which the Company replied with general expressions of disapproval, or simply rejected. GE spent the next five meetings delivering prepared presentations on the general causes of eco-

nomic instability, which the Union branded as a waste of time.

In subsequent meetings, the Company's posture remained unchanged. It would comment generally on some Union demands, and consider them in formulating its offer, but would not commit itself in any way. While it complained that the IUE proposals were excessive, it replied to Union requests for cost estimates with "we talk about the level of benefits," or that the proposals cost "a lot." GE would not indicate the total cost of a settlement it considered reasonable ("we talk level of benefits"); the Union in turn refused to rank its demands by priority, describing them all as "musts." Indeed the entire early period—and the later negotiations as well—were characterized by an air of rancor on both sides, which provided each with welcome opportunities to downgrade the other in communications to Union members.

GE finally revealed its own proposal informally on August 29. While expressing distress at some features of the offer, Union negotiators urged the Company to delay publicizing its "firm, fair" offer, so that its position would not be frozen before the IUE had an opportunity to examine it and offer changes. GE refused, agreeing only to hold up most of the prepared and packaged publicity until after formal presentation of the offer on the next day.

Union officials frequently renewed their requests for cost information during the ensuing month of negotiations. GE consistently refused to estimate the cost of its proposal or of any of its elements, so that the Union might reallocate its demands. When pressed for some of the highly-touted GE cost studies, Moore frequently slipped into the "level of benefits" format, and generally showed no interest in presenting alternate information that was available and would have served the Union's needs.

There were few modifications made in the original GE offer. The Company did propose an extra week's vacation after 25 years in exchange for a smaller wage increase; but Union officials had indicated at the outset that they were uninterested in paring down what they considered an already inadequate wage offer. Despite this, and in the face of the departure by Union officials for their national conference, GE publicized the "new" offer heavily in employee communications.

After declaring late in September that the "whole offer" was "on the table," GE contrary to prior practice, brought its position home by making its three per cent wage increase offer effective for unrepresented employees before the end of the contract or IUE acceptance. Two days later GE also put its pension and insurance proposals into effect, despite IUE President James Carey's complaint that this would "inhibit" any subsequent modifications.

On September 21, Federal Mediation Service officials began to sit in on the negotiations at the request of the Union. Their presence does not appear to have measurably aided the negotiations. The Union, in response to Company complaints that the IUE proposals were too costly, submitted a written request for information on the cost per employee of the GE pension and insurance plans, as well as the number of employees who could be expected to benefit from GE's vacation and income extension proposals. The request was refused in part, and the remainder was not complied with until after the strike, when the information would be of no substantial value to the Union.

Similar difficulties confronted the Union in its efforts to change the effective date of the pension and insurance plans. The Company proposed a January 1 date for the first increase in pension and insurance benefits; the Union in turn suggested that the increase in benefits should coin-

cide with the beginning of the contract. GE shifted its ground back and forth: first it claimed that the earlier date would be too costly; then it said that it was talking "level of benefits" and not cost; then it argued that prior contracts had always provided for pension increases on the first of the year. When this last ground proved to be incorrect, one GE negotiator promised to "consider" the October date, although he insisted the January date was "appropriate." During that afternoon, however, even this concession was withdrawn, and later explanations included describing January again as "appropriate," and "the time that you make all the resolutions for the New Year." [2]

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2 Without trying to follow the issue through all its permutations, some of the relevant portions of the negotiating minutes went as follows:

(September 21, 1960)

Carey (Union): . . . You change the dates of our proposal just so you wouldn't give us what we wanted.

• • • • •

. . . make the effective date of the Pension Plan October 2nd instead of January 1st.

Willis (Company): January 1, 1961 is all right.

Callahan (Union): You can do better than that.

• • • • •

Willis: Talk to Mr. Moore.

• • • • •

(Later that day)

Moore (Company): I know you did. You would like to have it October, 1960, and we feel it should be January 1, 1961 along with the other changes.

Fitzmaurice (Union): We have people who are going to retire between October and January. They feel that they are out in limbo.

Moore: This would apply to many people any time you set a date a particular date.

Callahan: Didn't the five-year agreement on pensions extend from the time of the agreement and not January? [The 1955 pension agreement began by the date of the overall 1955 agreement.]

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(*continued on following page*)

Union officials complained that "it is just because we request something that you would refuse to give it," and subsequent Company explanations served to support,

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(September 22, 1966)

Carey: Could you bring in for the conciliators the difference in terms of the cost between what we are proposing and what you want. You know—the cost of making the effective dates different.

* * * * *

. . . . We are asking you to determine the costs of making the effective dates that we suggest and the difference in yours.

Moore: Mr. Carey, we are talking level of benefits. You know that. We don't talk cost. We talk level of benefits.

* * * * * *

Willis: It is the appropriate date, Mr. Carey.

Lasser (Union): Is this your idea of collective bargaining that you listen to us and then you come to a conclusion and that is it.

Hilbert (Company): No, Dave, you know that. Unless you have something to convince us differently.

Lasser: Why that date? Why April 1962? [April was the date the Company preferred to have the second step-up in pension benefits.]

Willis: The wage structure will come up at that time and it will be changed at that time, that is why.

Carey: Wait a minute, wait a minute, wages will go up October 1, 1961. Let us make the agreement that the date the wages go in—that is the date the wages go in, the pensions go in effect at that date.

Hilbert: Let's wait and see what happens on wages—it won't be October, 1961.

Carey: All right—let's leave it on that basis. If it is based on the wage structures we can conform to those dates.

Hilbert: We can consider it.

* * * * *

Carey: We would like to proceed to arrive at an agreement on insurance, vacations and holidays like we did on pensions. I think we have an agreement on that if Management would change the date of the pensions to the date of the wage levels, now that they said that Mr. Hilbert would consider.

Moore: Mr. Carey, we aren't taking anything under advisement for later consideration.

Carey: A Management representative said that they would take it under advisement for later consideration. Sid and Hilbert did. I think you ought to leave them alone and go on to your assignment, Mr. Moore. Maybe we can get an agreement.

(*continued on following page*)

rather than to undercut, this feeling. On September 28, with three scheduled meetings left before the end of the contract, a Union negotiator, seeking to salvage something of the earlier IUE Supplemental Unemployment Benefits proposal, suggested a local option plan under which some of the funds the Company had allocated to wage increases and its income extension offer could be diverted to supplement unemployment compensation. He was clear that nothing was to be added to the Company's costs. Moore responded, "After all our month of bargaining and after

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Moore: Do we have that cleared up? We have nothing under advisement, Mr. Carey.

Carey: What are these fellows doing here. They said they would take it under advisement.

Moore: We aren't taking anything under advisement, Mr. Carey. It is all on the table.

Carey: Can we get an agreement on a tentative basis like we did on pensions?

Moore: We have got everything there is on the table. We have all five items in the proposal. They are on the table.

* * * * *

On September 27, 1960, the Union raised the question of pension dates again:

Stanley (Union): I was here. Last week you said you were basing your pension date on the date that wages were made effective which was April, 1962 and if it changed you would consider.

Hilbert: Let's take first things first, Mr. Stanley.

Sigal (Union): How about the first part of the pensions and their effective date? Why aren't the pension changes effective on that date? The 1st of October, 1960.

Willis: We did make them effective the first part. We made the increase of $2.25 to $2.40 effective on January 1st.

Sigal: Where does the April, 1962 date come from?

Willis: It's the mid-point of the contract.

Sigal: If it is status that counts, what does January 1, 1961 have to do with it? That isn't the mid-point of the first part.

Hilbert: You know it's the beginning of the year and it's the time that you make all the resolutions for New Years and all that.

Sigal: You mean all the things that you break, is that it? If you are talking about contract dates it should be October 1, 1960.

Willis: We think it is an appropriate date, Mr. Sigal.

telling the employees before they went to vote that this is it, we would look ridiculous to change it at this late date; and secondly the answer is no." A few moments later Moore reiterated his belief that "we would look ridiculous if we changed it." Hilbert, for GE, later gave three reasons why the Company would not consider the proposal—and two of them were that it would make GE "look foolish in the eyes of employees and others . . . ."

GE on September 29 rejected a Union offer to maintain the status quo under the old contract until a new one was signed, specifically refusing the cost-of-living escalator clause, and stating that it would "consider" later Union-related terms such as dues checkoff. A strike (which took place on October 2, except for the Schenectady Local, which joined October 6) was clearly imminent. Although claiming to be uncertain about truce terms with national IUE negotiators, GE headquarters on September 29 authorized its Schenectady Employee Relations Manager, Stevens, to offer all the pre-existing terms of the contract (except for the cost-of-living term) to the local. Stevens did so in statements to Union members and to the local Business Agent, Jandreau. A similar offer was made to the Pittsfield local, and broadly publicized there.

By October 10, the Company (after the Union had filed an unfair labor practice charge) made the same offer to the Union's national negotiators, for any locals that returned to work. Despite rejection by the Union at the national level, the Company proceeded to deal directly with local officials, and to urge acceptance of the offer. When local officials demurred, as, for example, at Lynn, Massachusetts, publicity was aimed at the employees themselves, criticizing the local officials' stand on the "truce." Similar events occurred at Waterford, Louisville, Bridgeville, and Syracuse.

Throughout the course of the strike, GE communications to the employees emphasized the personal character of the Union leaders' conduct, and threatened loss of jobs to plants that returned to work late. Negotiations were held during the strike until October 19, when the Company declared that an impasse had been reached. During that period, GE refused to give the IUE definitive contract language until the Union had chosen which of the options it preferred, and until it gave its unqualified approval of the Company proposal.

On October 21, it became clear that Union capitulation was near. The Company, which had previously refused to delete the retraining provision from its offer, felt free to relax its position, and granted the Union's request to permit a local option on retraining. While refusing a joint strike settlement agreement, which both parties would sign, GE did propose a unilateral "letter of intent," indicating that it was in agreement with most of the Union settlement proposals. On October 22, the Union capitulated completely, signing a short form memorandum agreement (they had not yet seen the complete contract language to which they were agreeing), and the Company alone issued its letter of intent. The strike ended on October 24.

Two matters were left open for settlement: seniority for transferred employees, and dues checkoffs. Neither, when finally settled, represented more than an adjustment to take account of NLRB decisions that rendered the original form of the agreement of dubious legality. Some minor changes also followed, none of any considerable significance.

The only other events of importance occurred at the Augusta, Georgia plant. On October 5, the plant manager sent a letter to the four employees on strike (at that time the only ones), warning them that their employment would

be terminated and replacements hired if they did not return to work. On October 13, however, he sent them telegrams, retracting the earlier letter as to job termination, but indicating the replacements would be hired. More employees (twenty in all) joined the strike after October 5, and on October 24 the Company refused their unconditional offer to return to work. It did, however, give physical examinations to three of the employees, and rehired the two who passed.

IV.

The Specific Unfair Labor Practices

A. *Unilateral Insurance Proposal*

On June 1, 1960, before the reopening of negotiations, but after GE had agreed to meet with the Union on June 13 to hear its proposals, the Company notified the Union by letter that it would unilaterally institute a personal accident insurance proposal. Under the Company plan, the insurance would go into effect on July 1, would be paid wholly by the employees, and would be in addition to existing insurance coverage provided by GE. If the IUE objected, GE would not offer the insurance to its members; it would, however, make it available to other employees regardless of the stand taken by the IUE.

Prior to the June 13 meeting, GE publicized the new insurance proposal, along with the information that enrollment would take place later in the month. At the meeting, the Union objected strenuously to GE's failure to bargain over the insurance, claiming that it was clearly a bargainable issue, which GE had a duty to discuss with Union representatives.

Ordinarily, the matter would be relatively simple; it appears well settled that insurance is a mandatory subject for collective bargaining, and the employer violates section 8(a)(5) of the National Labor Relations Act by refusing to bargain over it. See *NLRB* v. *General Motors Corp.*, 179 F. 2d 221 (2d Cir. 1950); *Inland Steel Co.* v. *NLRB*, 170 F. 2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) (dictum). He would, of course, also violate the Act if he unilaterally changed the conditions or terms of employment. See *NLRB* v. *Katz*, 369 U.S. 736 (1962). Here, however, both the policy of section 8(d) of the Act, and the 1955 IUE-GE Pension and Insurance Agreement (which was to remain in force until October 1, 1960) affect the issue, although it is correct that section 8(d) is not by its terms applicable. Section 8(d) provides that during the term of a collective bargaining agreement neither party need:

> ". . . discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 U.S.C. §158 (d) (1964).

Under the 1955-1960 Pension and Insurance Agreement, each party waived the right to require the other to bargain as to pensions or insurance matters except during the stated renegotiation period—which, barring waiver, was months off.

Read expansively, and without any attention to the purpose of the section, the combination of 8(d) and the Pension Agreement might appear to protect any action that GE might take with respect to insurance during the term

of the agreement. In *Equitable Life Insurance Co.*, 133 N.L.R.B. 1675 (1961), however, the Board took the view that that 8(d) was designed to protect the status quo; it was to be used as a shield, not as a sword.

To support this view, the Board now urges that the legislative history demonstrates that the primary purpose to be served by the relevant portion of 8(d) was to achieve "peaceful industrial relations" through stable collective bargaining agreements which guard "the right of either party to a contract to hold firm to the terms or conditions of employment specifically provided for in writing." 133 N.L.R.B. at 1689. See II Legislative History, LMRA 1947, at 1625.[3] See also *NLRB* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, 684 (2d Cir. 1952). Indeed, a convincing *reductio ad absurdum* argument can be made that any other reading would construe 8(d) and the contract provision as permitting GE to make any modifications in the insurance terms that it sees fit—for example to increase or decrease its contribution to the existing policy—all without any consultation with or recourse for the Union. Section 8(d), the argument would run, covers "any modification," which would include a decrease in benefits. Such a construction is patently unsupportable; it would simply destroy the stability of the agreement that 8(d) is designed to protect. Moreover, viewing this as a matter of contractual interpretation, it seems highly unlikely that the Union would have ever considered such a clause.

An argument more reasonable superficially is that the Company might add to the agreement through unilateral

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3 "It [section 8(d)] merely provides that either party to a contract may refuse to change its terms or discuss such a change to take effect during the life thereof without being guilty of an unfair labor practice." II Legislative History of the Labor Management Relations Act (Taft-Hartley Act) 1947, at 1625 (remarks of Senator Taft).

action, but could not subtract from it. In a sense, of course, the difference is illusory. A collective bargaining agreement is a compromise not only between the parties, but of their past, present, and future goals. An insurance agreement that covers particular risks, in a specified way, impliedly rejects other risks, and other methods. Specifically, a Union may always oppose insurance plans to which its employees contribute, believing that the tax benefits of non-contributory plans to its members—and often to the company—in the long run will outweigh any present gains. Or, it may believe that it is important to keep insurance benefits within narrow bounds, so that at the next negotiating session it will be able to press more vigorously for other benefits. In this sense, then, even "additions" to the insurance agreement subtract from the basic compromise that the agreement represents.

Yet even if we were to ignore this threshold difficulty, there are serious objections to permitting one party to an agreement unilaterally to hold out this type of inducement to the other. It creates divisive tensions within the Union; employees with hazardous occupations will favor the proposal, while those with routine tasks will object. Whichever way the Union moves, it loses ground with some part of its constituency. Union democracy is not furthered by permitting the Company to pick the Union apart piece by piece. The same point may be made where there are both union and non-union employees. If the Union refuses the benefit, then it may appear, at least in the short run, to have disadvantaged its members vis-à-vis non-members. Thus it may be forced to sacrifice long-term goals to avoid short-term dissatisfaction.

In the context of this case, where the Company's tactics seemed so clearly designed to show the employees that the

Union could win them nothing more than the Company was prepared to offer, it is even more apparent that a unilateral offer—over which the Union may not bargain—diminishes the rewards and the importance of the bargaining at the end of the contract period. Thus the Union's ability to function as a bargaining representative is seriously impaired. Indeed, such conduct amounts to a declaration on the part of the Company that not only the Union, but the process of collective bargaining itself may be dispensed with. Cf. *Equitable Life Ins. Co.*, 133 N.L.R.B. 1675, 1693 (1961).

A far more subtle argument on behalf of the Company concentrates on the effect the *Equitable* rule has on non-Union employees. This line of thought suggests that the employer can always grant unilateral benefits to non-Union employees. If he were forbidden to do so whenever some of the employees chose a Union as their bargaining representative, then the Union would in effect have the ability to prevent non-Union employees from making an independent choice on benefits. In fact, the argument goes, he would be denying the unrepresented employees their right to refuse to be represented by the Union, and would thus be committing an unfair labor practice. See §7, 29 U.S.C. §157 (1964) ("Employees . . . shall also have the right to refrain from any or all of such activities . . . ."); §8(a)(1), 29 U.S.C. §158(a)(1) (1964) (making violations of §7 an unfair labor practice).

There are two answers to this argument. Section 8(a)(3), 29 U.S.C. §158(a)(3) (1964), forbids discrimination in terms of employment that discourage or encourage union membership. Were GE unilaterally to give only non-Union employees a cash bonus, it would be violating the policy of section 8(a)(3), if its aim were to disparage

the Union. Under some circumstances, in fact, its subjective state of mind would be wholly irrelevant. See Note, *Labor Law—The Decreasing Importance of Employer Motivation as an Element of Unfair Labor Practice,* 46 North Carolina L. Rev. 975 (1968). Hence it is not by any means clear that an employer may give benefits to non-union employees whenever he wishes; his freedom, and that of the non-union employees, is limited by section 8(a)(3).

Moreover, *Equitable* hardly says that an employer like GE may not offer to increase benefits during the term of the contract; rather, its thrust is that if an employer wishes to do so, he must be prepared to bargain with the union. The Act can hardly be read to require less.

GE attempts to distinguish *Equitable* by urging that only section 8(d) and not a contract provision was at stake in that case, and the employer attempted to capitalize on the dilemma it created for the union. The first ground is unconvincing. GE does not direct us to circumstances indicating a desire by the parties to the collective bargain agreement to do more than invoke the protections of section 8(d). Indeed, the Company described the contract language as "the standard 8(d) clause." [4]

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4 Title 1, Section 4 of the IUE-GE 1955 Pension and Insurance Agreement provided in part:

> ". . . each of the parties voluntarily and unqualifiedly hereby waives any and all rights to require that the other party or parties hereto bargain collectively during the term of this Agreement, with respect to any such subjects or matters whether or not such matters are covered by this Agreement . . . .
>
> The Union and Locals agree that, during the term of this Agreement, there shall be no strike, slowdown, sitdown, or other form of stoppage of work arising out of or conducted in connection with any effort to induce modifications of or amendments or additions to the insurance and pension benefits provided for by this agreement . . . ."

Despite the extremely broad language of the first paragraph, the language of the second—"to induce modifications of or amendments or

Although the Trial Examiner found that GE did not attempt to capitalize on the IUE's refusal to accept the personal accident insurance proposal, this case is not distinguishable from *Equitable*. The employer's attempt to use the Union's plight to its own advantage was not a determinative factor there. The dilemma created by an employer exists whether he uses it crudely or subtly; it is inherent in a take-it-or-leave-it bargaining approach. True, GE did not capitalize on the Union's refusal; but through its enrollment program late in June, and by the unavoidable controversy that the issue itself raised in Union ranks, the Company was able to profit from the situation without exploiting it outright. The rationale of the Board's *Equitable* rule reaches at least that far. Once it is clear that the party who disrupts the status quo cannot rely on section 8(d) to protect his conduct, then unilateral action over a mandatory matter, joined to a refusal to bargain, represents a straightforward rejection of the collective bargaining principle in fact. See *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962).

Lastly, GE urges that since the *Equitable* decision was not filed until 1961, it should be found blameless, since it did not know that its conduct was proscribed.[5] Of course,

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additions to the insurance agreement"—seems rather clearly to indicate that this clause, like section 8(d), was for the benefit of the party attempting to maintain the status quo, and not the party seeking to unsettle it.

The NLRB may interpret such a contract during the course of an unfair labor practice hearing, where the question is whether the union waived a statutory safeguard. *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967).

5 GE cites *Columbine Beverage Company*, 138 N.L.R.B. 1297 (1962), for the proposition that it might avoid an unfair labor practice finding by relying on a pre-existing NLRB ruling. In *Columbine* an employer refused to bargain with a unit at a time when the NLRB considered the unit appropriate. After the union filed unfair labor practice charges,

it is also true that the conduct, although not yet proscribed, had not been judged proper either, and indeed, Equitable Life Insurance Company itself stands on the same footing with GE in that respect. In any event, parties who make a practice of stretching the statutory fabric to the breaking point should not be surprised when the cloth gives way. Cf. *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 620 (1969) (condemning "brinkmanship").

B. *Refusal to Furnish Information*

It is conceded that in the prenegotiation period GE was quite cooperative in aiding the Union to secure information. GE submits that it spent over $100,000 in fulfilling Union requests. Indeed, in several instances where the necessary data was too costly to obtain, or was unavailable, GE suggested a substitute, which substantially satisfied the Union's needs without straining the Company's resources.

Once formal negotiations were underway, however, GE's attitude changed markedly. A pattern gradually began to develop in which the Union would propose a particular benefit, Company negotiators would label it as "astronomical," or "costly," and when pressed by the Union for figures to back up their cost criticisms, would respond with "we talk level of benefits, not costs."

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the Board in another case decided that the unit was not an appropriate one. The NLRB held that since his conduct was illegal at the time that it occurred, the employer could not rely on the later NLRB decision to purge itself, and thus sustained an unfair labor practice finding.

Here, however, there was no outstanding ruling that an employer might propose new terms to a collective bargaining agreement on a take-it-or-leave-it basis; *Equitable*, decided a year later, was a case of first impression. More to the point, *Columbine* merely held that later decisions would not be a defense to charges based on law in effect at the time that the conduct occurred. GE apparently is assuming that the converse principle is necessarily true—indefensible in logic, and with a nod to Justice Holmes, equally so in law.

There were times when the format changed, but the result remained relatively the same. On occasion, the Company might suggest one set of employment security provisions, which the Union did not like. When the Union indicated that it preferred its proposals to the Company's, the Company responded that the Union alternates were too costly. GE refused to indicate the cost of Union proposals, or how much it was willing to expend, so that the Union might recast its demands. The following exchange is not atypical:

> Swire (Union): We are asking for an improvement in maternity. We want the Company to pay everything up to $550, then co-insurance after that.
>
> Willis (Company): Something like that is out of reach. Maternity is the most expensive item.
>
> Swire: What does it cost, Sid?
>
> Willis: We talk level of benefits, not costs.

The cases that have dealt with the difficult problem of giving meaning to "bargaining in good faith" are instructive. In *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149 (1956), the company claimed that a wage increase of over 2½ cents per hour would put it out of business, but refused to furnish the Union with any indication of its financial status. The Supreme Court, in finding that the Company had committed an unfair labor practice, commented,

> "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." 351 U.S. at 152-53.

See also *NLRB* v. *George P. Pilling & Son Co.*, 119 F. 2d 32 (3d Cir. 1941); *NLRB* v. *Western Wirebound Box Co.*, 356 F. 2d 88 (9th Cir. 1966).

Moreover, it is not always necessary that the Company put the cost of its proposals in issue, or even refuse Union demands on the ground that they are too costly. In *Sylvania Electric Products, Inc.* v. *NLRB*, 358 F. 2d 591 (1st Cir.), cert. denied, 385 U.S. 852 (1966), the court decided (without raising the issue of cost justifications by the company) that pension and insurance costs (which it labeled "collateral" issues) should be made available to the Union where it wished to weigh the value of such plans against an increase in take-home pay.[6] This is particularly true, of course, where the Company contributes to the plan, thus in effect substituting it for wages.

The rationale of these opinions seems obvious; if the purpose of collective bargaining is to promote the "rational exchange of facts and arguments" that will measurably increase the chance for amicable agreement, then sham discussions in which unsubstantiated reasons are substituted for genuine arguments should be anathema. See Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401 (1958).

The Board and the Trial Examiner relied on two specific instances of refusal to furnish information to sub-

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6 GE argues that a prior decision of the First Circuit, *Sylvania Electric Products, Inc.* v. *NLRB*, 291 F. 2d 128 (1st Cir.), cert. denied, 368 U.S. 926 (1961), denied discovery of such information for a noncontributory plan and thus demonstrated that the state of the law was, at the very least, highly unsettled. In the first *Sylvania* case, however, the court was careful to indicate that if the Company interposed a cost objection to a Union proposal—as here—the Union might be entitled to the cost figures, citing *Truitt*. In any event the second *Sylvania* case expressly distinguished the first almost to the point of extinction by permitting the Union to demand cost information wherever the Union sought to weigh the value of different possible wage-benefit packages.

stantiate their unfair labor practice charge. The first was an oral request by the Union on August 24 for the number of employees with one year, and with twenty years, of service, so that the Union might determine the cost of its demand for a fourth week of vacation for employees with 20 or more years of service. Carey later pointed out that this request was in response to the Company's labelling the Union's vacation plan as "astronomical." Hilbert, for GE, stated that the Company did not have the information; on August 31 Moore responded that GE was discussing "the level of benefits."

The second refusal to furnish information relied upon occurred in September. When the Union, on September 8, sought to evaluate the number of employees who would have benefited from the Company's Income Extension Aid proposal, had it been in effect for the past two years, Moore responded, "Somewhere between zero and 100 per cent." Later in the month, on September 22, the IUE put this and other requests for information in writing, and submitted them to GE. Like the original August oral request, the cost information the Union wanted was put in issue by the Company's repeated references to cost as a justification for rejecting Union proposals, or as a reason for preferring Company plans.[7] GE also frequently couched its objections to Union demands on the ground of "competition," thereby implying that the cost of the IUE proposals was a material element in its considerations. See *Local 5571, United Steelworkers of America* v. *NLRB*, 401 F. 2d 434 (D.C.

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7 For example, on August 31, GE negotiators rejected the Union's SUB proposal as "an expensive item," but then refused to value its own income extension aid (IEA) proposal because "we haven't figured it out yet," but SUB "would cost a lot more." Similar discussions occurred over pensions, insurance, wages, and the cost-of-living escalator clause that the Company wanted dropped from the new contract.

Cir. 1968); *NLRB* v. *George P. Pilling & Son Co.*, 119 F. 2d 32 (3d Cir. 1941).

The September 22 letter requested basically five categories of information: (A) cost per employee of proposed insurance benefits; (B) cost per employee of proposed pension benefits; (C), (D) number of employees likely to benefit from the Company's income extension aid (IEA) program; (E) number of employees with 20 or 25 years of continuous service.[8] The last request, like that made

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8 The text of the letter was as follows:

September 22, 1960

Mr. Philip D. Moore, Manager
Employee Relations Service
General Electric Company
570 Lexington Avenue
New York 22, New York

Dear Sir:

We have made oral requests several times, since General Electric announced its contract proposals on August 30, 1960, for information necessary for intelligent bargaining on this matter. The requests were rejected.

In order that we may be in a position to appraise the cost of your proposals, and to determine the number of people who might benefit by them, we renew our request for the following information with respect to the employees in each of the General Electric bargaining units represented by the Union and its locals:

A. Cost per employee, and also for employee dependents, of each proposed new insurance benefit, and of each proposed increment in existing benefits, broken down into

(1) cents per month premium, and

(2) cents per month net cost estimated on basis of the Company's 1959 experience.

B. Cost in cents per hour per employee of the proposed increment in each of the pension benefits.

C. Number of employees on the Company's recall list as of June 30, 1960, for

(1) less than 6 months;

(2) more than 7 months and less than one year;

(3) more than one year.

(*continued on following page*)

orally on August 24, was designed to test the Company's assertion that an extra week of vacation after 20 years would be too expensive, and that one after twenty-five years would be preferable.

Addressing ourselves first to the oral request of August 24, GE never did reply until it answered the same question, posed under "E," above, after the strike was over. While there is some dispute over whether the Union orally requested the information for the whole Company or for IUE units alone, there is no disagreement that GE had the figures available on a company-wide basis.

Even if we were to assume that the Union had asked for figures for IUE units alone, GE's failure to provide the information is inexcusable. The Trial Examiner appropriately found that GE could readily have obtained the data from local plants, and even had it been unwilling to do so, it could, at a minimum, have informed the Union that it had the information available on a company-wide basis, which the Union probably would have found just as useful (since GE indicated that it would put the same benefits into effect for all employees, pursuant to its uni-

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D. Number of employees who have been recalled since January 1, 1960, and who, prior to their recall, had been laid off

(1) less than 6 months;

(2) more than 6 months and less than one year;

(3) more than one year.

E. Number of employees with [following handwritten to semicolon]

(a) 20 years;

(b) 25 years or more continuous service.

We would appreciate having this information without delay.

Very truly yours,

/s/ JAMES B. CAREY
James B. Carey
President

formity policy). Thus, under the most favorable interpretation of the facts, GE's offhanded refusal to submit information on an issue which it had itself raised, would amount to an unfair labor practice. This conclusion is fortified by GE's behavior in the prenegotiation meetings, when it demonstrated that it was capable of providing information—indeed even suggesting that it be provided—in a form different from that originally desired. If we were to hold that because the information requested did not conform precisely to the data in the possession of the Company, an employer might refuse to provide any data at all, we would, in our view, be taking a step backwards, towards incorporating all the worst features of the ancient common law pleading system into our present-day labor negotiations. GE seems to suggest that even an insignificant variance between the request and the available information would be a complete bar to the Union—even though it was utterly unaware of the precise form in which the Company kept its records, and the Company refused to enlighten it. In a day when liberal pleadings, liberal discovery, and modern rules of evidence have largely superseded ancient formalism, grafting such a pointless and dysfunctional rule onto negotiating procedures is clearly out of place.

GE did finally respond to item "E," as well as items "C" and "D" in the September 22 letter, on November 7, after the strike had been settled and the contract agreed upon.[9] All three of the requests required that the Company collect information from its local plant managers; GE, however, waited until October 24 to initiate the collection

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9 The Company also answered with a letter on September 28, which refused items A and B as "speculative," indicated that C and D "would take some time" and answered that portion of E relating to 25 years of service, but not that for 20 (despite the fact that the latter request had been made orally more than a month earlier).

process. The Company also claims that mass picketing, violence, and problems of shutting down struck plants forced it to delay. But, as the Trial Examiner pointed out, this retrospective explanation fails to explain the initial delay of a week, before the strike began. The Trial Examiner, who had the opportunity to observe and evaluate the testimony, refused to credit this explanation. Finding that his conclusion (adopted by the Board) is supported by substantial evidence (and is not vigorously contested by the Company), we conclude that the Company committed an unfair labor practice by failing to provide the information, highly relevant to the negotiations, within a reasonable time. See *NLRB* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260 (2d Cir.), cert. denied 375 U.S. 834 (1963); *Utica Observer Dispatch, Inc.*, 111 N.L.R.B. 5863, enforced 229 F. 2d 575 (2d Cir. 1956); *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850, enforced 205 F. 2d 131 (1st Cir.), cert. denied 346 U.S. 887 (1953). See also section 10(e), 29 U.S.C. §160 (e) (1964); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951) (Frankfurter, *J.*).

Items A and B, mentioned in the September 22 letter—the estimated per employee pension and insurance data—were never provided by the Company. It insisted that it was not legally required to disclose the cost of fringe benefits to it, and that in any case the information was so "purely speculative" that compiling it would be both burdensome and valueless. The first contention seems clearly wrong. In order for the Union to assess properly the Company's objections to some of its proposals, and to understand which of GE's objections to cost were soundly based, the IUE had to have the basic data on which to make informed choices.

A union weighing wages against benefits, or one form of benefit against another, should receive answers to its

genuine non-burdensome requests for cost information. If the Union were denied such data, it would be unable to bargain intelligently, and arrive at sensible and reasoned decisions, particularly those involving reallocation of benefits within GE's cost framework. Even the first *Sylvania* decision indicated that when the employer (as here) puts cost in issue, or the discussion involves a contributory plan (as here), the Union may be entitled to cost information. See also note 6, *supra*.

The Company further urges that since the Trial Examiner found that some of the information would have been difficult or expensive to obtain in the form requested, it need not have provided it. But GE had most of the information in some form that would have been useful to the Union, and easily could have either presented it in that form, or at least advised the Union that it had other relevant information (like the C, D, and E data) available. The objection is unavailing.

The last major claim is that future pension and insurance costs were "purely speculative" and only "educated guesses." The difficulty with this stand is that it would excuse the Company from furnishing virtually all information of which it was not absolutely certain. In bargaining, as in most other circumstances, it is the use to which the information is put that should determine the degree of accuracy that is required. The root question, as posed in the second *Sylvania* case, is whether the data "would significantly aid in the bargaining process." 358 F. 2d at 592. There can be no question that the information available would have assisted the Union here; GE committed an unfair labor practice in withholding it.[10]

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10 A last claim, like that made in the take-it-or-leave-it personal accident insurance unfair labor practice, is that bad faith could not be found since GE under then-existing precedents could not have known that its

C. *Bargaining Directly with Locals*

As we have pointed out above, GE and the IUE had a consistent pattern of national negotiations for over ten years before the 1960 strike. There can be little doubt that the Board's finding that GE recognized and dealt with the IUE-GE Conference Board as representative of all IUE locals was both supported by substantial evidence and correct.[11]

Once the strike was imminent, however, GE abandoned this pattern, and dealt separately with several of the IUE locals. On September 29, GE notified the IUE at their bargaining meeting that after October 1, it would consider its contractual obligations at an end; it would continue current wages, benefits, and seniority, but such union-related matters as dues checkoff, grievance time pay and superseniority for union officials, would have to be "considered."

That same day, however, GE headquarters authorized their local Employment Relations Manager, A. C. Stevens, in Schenectady to offer more to the local there than had been offered to the national negotiators, if Schenectady Local 301 stayed at work. Specifically, all the union-related provisions of the old contract—dues checkoff and the like—were to remain in effect, while at the national level, GE

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conduct would be found wanting. It deserves the same reply. What has been said should indicate that GE's reliance on the first *Sylvania* case is misplaced, particularly where the Union's need was clear, and the Company's refusal not attributable to a legitimate concern other than doing the minimum that the law required.

11 At Louisville, Waterford, and Bridgeville, the IUE itself was certified as the bargaining agent; at Schenectady, Syracuse, Lynn, and Pittsfield, individual locals were certified. However, by reason of consistent past practice, GE was obliged to treat the IUE-GE Conference Board as the representative of all.

had committed itself only to "consider" them. On October 4, Stevens wrote to Leo Jandreau, Local 301's business agent, stating:

> "We agree to extend to you protection of the recent contract, including grievance machinery, protection covering working conditions, seniority, prices, wage rates, and any other condition of employment recited in the contract. Current cost-of-living adders will remain in effect. We will continue union representation recognition as presently constituted and all the above will remain in effect so long as we are not on strike."

On the same day, the local Employee Relations Manager at Pittsfield made a similar offer, containing the same truce conditions, which was broadly publicized.[12] The IUE then filed an unfair labor practice charge, based on the offers to the locals. Several days later (about October 10), GE offered the same terms to the national negotiators.

On the day the Company made its Schenectady-Pittsfield terms available to the IUE generally, the Lynn, Massachusetts Employment Relations Manager, Robert Burns, wrote to Lynn Local 201's Business Agent, and proposed:

> ". . . we meet to work out a memorandum of intent which would re-establish for all employees represented by Local 201 all of the provisions which were in the contract . . . which . . . would go into effect when Local 201 terminates the strike in Lynn while contract negotiations continue."

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12 GE claimed that the Pittsfield Local initiated the discussion of truce terms. The Trial Examiner, who had the opportunity to observe the witnesses, disbelieved this testimony, and the Board sustained him. We are unable to say that his finding is unsupported by substantial evidence; in any case, it should not matter who initiates the dealing. See *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678, 683 (1944).

At Waterford, a similar proposal was made to the local Business Agent, and union members were telephoned by their foremen and urged to convince their local officers to accept the return to work proposal.

At Louisville, Kentucky, the Employee Relations Manager forwarded a copy of the Company's October 10 proposal along with a noncommittal letter to the Local Business Agent indicating that the copy might be "helpful" in removing the "confusion" over how employees might return to work. The Bridgeville, Pennsylvania Employee Relations Manager also forwarded a copy of the proposal, but he in addition added that he was

> ". . . suggesting it to you and other Local 640 officials as a means of permitting local members to return to their jobs and to continue to earn their wages, until a settlement agreement is reached."

At Syracuse, in a phone conversation between the Local President and the Union Relations Manager, the Manager not only suggested accepting the terms now offered to the IUE nationally, but indicated that the President and several other Syracuse employees could have their alleged strike misconduct suspensions lifted if they returned to work.

The Trial Examiner and the Board agreed that in each instance GE committed an unfair labor practice when it went behind the backs of the national negotiators and offered separate peace settlements to locals. *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944) sustains this conclusion. In *Medo*, several employees who appeared to represent a majority met with their employer to express their dissatisfaction with the union representing them. They offered to abandon it if their wages were increased.

When the Employer treated with the dissenting employees, the Court held, he violated section 9(a) of the Act, 29 U.S.C. §159(a) (bargaining representatives of the union are "exclusive"). Therefore, he committed unfair labor practices under sections 8(a)(1) and 8(a)(5), 29 U.S.C. §§158(a)(1), 158(a)(5) (1964). *Medo* instructs that it does not matter who initiates the by-passing of the bargaining representatives. 321 U.S. at 683. Subsequent cases appear to have applied the doctrine even where the offer to the local or to the employees was no better than that made to the bargaining representative. See, e.g., *Independent Stave Co.* v. *NLRB,* 352 F. 2d 553 (8th Cir. 1965), cert. denied, 384 U.S. 962 (1966) (by implication). We have, under similar circumstances, condemned efforts by an employer to take a matter up with his employees, where their bargaining representative had already taken a stand on the matter. *Utica Observer-Dispatch* v. *NLRB,* 229 F. 2d 575 (1956). But cf. *NLRB* v. *Penokee Veneer Co.,* 168 F. 2d 868 (7th Cir. 1948).

The terms offered at Schenectady and Pittsfield were in fact better than those made available to the national negotiators. There can be no question but that such offers clash with the *Medo* rationale, for they cut deeply into the Act's command that bargaining representatives be "exclusive." See §9(a), 29 U.S.C. §159(a) (1964). The Company's claim that it had to "clarify" its position to the Schenectady management so that they would know what terms to effectuate if the local there came to work ignores the fact that it was the Company's vagueness on return to work provisions that caused the need for clarification. In any case, the additional union-related terms should have been offered to the national negotiators for their consideration before—or at least at the same time that—they were

given to the locals; yet GE waited until the Union had filed an unfair labor practice charge to do so. We agree with the Board that GE committed an unfair labor practice by failing to respect the IUE-GE Conference Board's status as exclusive bargaining representative.

The other proposals complained of occurred after October 10, and so there is no question (with the possible exception of Syracuse) of offering more to the local than to the national negotiators. Yet, as we have suggested, this factor cannot be dispositive. The vice that *Medo* sought to avoid was the practice of undermining the authority of the union's bargaining representatives through direct dealings with the locals or employees they represented. Such tactics are inherently divisive; they make negotiations difficult and uncertain; they subvert the cooperation necessary to sustain a responsible and meaningful union leadership. The evil, then, is not in offering more. It is in the offer itself.

At Lynn and Waterford it is clear that the employment managers were proposing that they and the local make a separate settlement. At Lynn, GE even offered a separate "letter of intent." Bridgeville is similar, and though the evidence is not so strong, the Board might reasonably have found that the manager there was suggesting an independent settlement. The offers of reinstatement at Syracuse place that proposal as well in the forbidden category, for they indicate that an individual settlement was being held out to the local.

At Louisville, however, the only indicia the Board relies on pointing to a separate agreement, or to treating separately with the local, is the fact that the letter was addressed to the local's president. A fair reading of the brief missive, however, fails to disclose that it had any-

thing more than an informational purpose, giving the content of the proposal made at the national level previously. The basic distinction is between attempting to reach a separate settlement with the local—as at Schenectady—and keeping the local informed of Company positions. In circumstances such as these, the interest in free speech and informed choice must prevail over the slight possibility that the representatives' positions might be undermined, and thus we believe the Board's finding is unsupported by substantial evidence. See *NLRB* v. *Penokee Veneer Co.*, 168 F. 2d 868 (7th Cir. 1948). Cf. *Linn* v. *United Plant Guard Workers of America*, 383 U.S. 53, 62 (1966) (favoring "uninhibited, robust" debate).

V.

Overall Failure to Bargain in Good Faith

We now approach the most troublesome and most vigorously contested of the charges. In addition to the three specific unfair labor practices, GE is also charged with an overall failure to bargain in good faith, compounded like a mosaic of many pieces, but depending not on any one alone. They are together to be understood to comprise the "totality of the circumstances." Despite my brother Friendly's distaste for the term, past decisions have indeed emphasized that good faith—or lack of it—must in the absence of a per se violation depend upon a factual determination based on the overall conduct of the party charged. See *NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 498 (1960); *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956). The Board can hardly be faulted for resting its finding on a ground that the Supreme Court has mandated. Certain specific practices, such as making uni-

lateral changes in working conditions during bargaining, can be found to constitute per se violations of the duty to bargain, since they constitute a "refusal to negotiate in fact." See *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962). When such conduct is present, the Board need make no finding that the totality of the party's conduct manifests bad faith; the practice itself is conclusive on that issue.

The Board, however, chose to find an overall failure of good faith bargaining in GE's conduct. Specifically, the Board found that GE's bargaining stance and conduct, considered as a whole, were designed to derogate the Union in the eyes of its members and the public at large. This plan had two major facets: first, a take-it-or-leave-it approach ("firm, fair offer") to negotiations in general which emphasized both the powerlessness and uselessness of the Union to its members, and second, a communications program that pictured the Company as the true defender of the employees' interests, further denigrating the Union, and sharply curbing the Company's ability to change its own position.

The Board relies both on the unfair labor practices already discussed and on several other specific instances to show that GE had developed a pattern of conduct inconsistent with good faith bargaining. It points to GE's proposed personal accident insurance proposal on a take-it-or-leave-it basis as an example of an attempt to bypass the Union, and an attempt to disparage its importance and usefulness in the eyes of its members. GE's response to this is that the *Equitable* case had not been decided in 1960. Therefore, it argues, its actions were based on a "justifiable belief" in the state of the law at that time and cannot support the view that the Company was motivated by bad faith.

This reasoning overlooks the principle that acts not in themselves unfair labor practices may support an inference that a party is acting in bad faith. See *NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 506 (1960) (Frankfurter, *J.*, concurring). While GE may have believed that it was acting within its "rights" in offering a take-it-or-leave-it proposal, doing so may still be some evidence of lack of good faith. Here there was no substantial justification offered for refusing to discuss the matter, other than a niggling—and incorrect—view of the contract and the statute. Cf. *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131 (1st Cir.) (Magruder, *J.*) ("must make *some* reasonable effort in *some* direction"), cert. denied 346 U.S. 887 (1953). Given the effects of take-it-or-leave-it proposals on the Union, already set forth in our review of the specific unfair labor practice charges, the Board could appropriately infer the presence of anti-Union animus, and in conjunction with other similar conduct could reasonably discern a pattern of illegal activity designed primarily to subvert the Union.

We have already discussed at length the Company's failure to furnish information. As in the instance of the personal accident insurance proposal, GE's attitude on information was characterized by a pettifogging insistence on doing not one whit more than the law absolutely required, an insistence that eventually strayed over into doing considerably less. GE's conduct, as the Board's opinion points out, was all of a piece. It negotiated, to the greatest possible extent, by ignoring the legitimacy and relevance of the Union's position as statutory representative of its members. Thus it is hardly surprising that IUE requests for information were met (at least once negotiations had begun) with less than enthusiasm, for

they reflected the Union's contrary belief that it had to know the worth of the Company proposals in order to evaluate them for its members.

GE's reluctance to part with information was not limited to the specific instances complained of as an unfair labor practice. The record discloses that even before the general reopening of negotiations, GE displayed a patronizing attitude towards Union negotiators inconsistent with a genuine desire to reach a mutually satisfactory accord. During the early meetings devoted to employment security, GE's responses to the Union's detailed proposals were vague and uninformative, hardly calculated to apprise the IUE of GE's stand on any of the matters about which it wanted to negotiate. When the Union finished presenting its plan, GE, instead of offering counter-proposals, or commenting specifically on the IUE's suggestions, offered a prepared lecture series on the general causes of economic instability, a response not at all designed to enlighten the Union on specific bargainable matters. This impression is reinforced by Moore's consistent refusal to permit the lecturing Employee Relations Managers to answer specific Union inquiries.

More crucial, perhaps, was the Company's persistent refusal, after publicizing its proposal, to estimate not only the cost of components of its offer, but the total size of the wage-benefit package it would consider reasonable. Responses such as "it hasn't occurred yet" were interposed when IUE negotiators asked for estimates of the GE offer; yet the trial examiner found (as GE's bargaining philosophy required) that considerable cost studies had in fact been made, which would have been of substantial assistance to the Union. Without an estimate of the overall size of GE's offer, the Union was hamstrung in its efforts to

decide which substitutions were reasonable, whether to press for more total benefits, or how much redistribution could be accomplished within GE's cost framework.

In addition to its reluctance to make meaningful cost disclosures, GE occasionally took untenable and unreasonable positions and then defended them, with no apparent purpose other than to avoid yielding to the Union. The most flagrant example occurred in setting the date for the beginning of pension and insurance benefits. As indicated in our opening discussion of the negotiating background, GE vacillated back and forth, chose inconsistent and confusing explanations at random, interposed some inconsequential attempts to pass the problem off with banter, and finally settled by characterizing the date it had chosen as "appropriate." See note 2 *supra*, and accompanying text. Certainly, GE could insist on any dates that it desired—but its manner of responding to Union inquiries reflected its philosophy of "bargaining."

When the last act was virtually played out and it had become apparent that the Union would have to end its abortive strike and concede to GE's terms, the Company continued to display a stiff and unbending patriarchal posture hardly consistent with "common willingness among the parties to discuss freely and fully their respective claims and demands and, when these are opposed, to justify them on reason." *NLRB* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 37 (3d Cir. 1941). With the Union, as it were, "on the ropes," the Company insisted that IUE choose the options that it preferred, and assent to the contract unconditionally, without ever seeing the final contract language. When the Union protested that the memorandum proposed for its signature was too vague, the Company refused to submit more definite language. Four days later, the Union capitulated completely and signed the short form memo-

randum, still without having seen the final contract to which it was agreeing.

In a similar vein the Company rejected the notion of a bilateral strike settlement agreement. Instead, it proffered a unilateral "letter of intent." While again, it is true GE did not have to sign a joint settlement agreement, it gave no reason for refusing to do so (other than that this had been its past practice). The Board might reasonably infer that its prime purpose was to avoid recognizing the Union's status as bargaining representative of the striking employees, and not to further any legitimate business aim.

GE argues forcefully that it made so many concessions in the course of negotiations—concessions which, under section 8(d), it was not obliged to make—that its good faith and the absence of a take-it-or-leave-it attitude were conclusively proven, despite any contrary indicia on which the Trial Examiner and the Board rely. The dissent proceeds under the misapprehension that we consider lack of major concessions as evidence of bad faith. Rather, we discuss them only because while the absence of concessions would not prove bad faith, their presence would, as GE claims, raise a strong inference of good faith. On close examination, however, few of the alleged concessions turn out to have a great deal of substance. Its offer of a wage reopener accompanied its original proposal; the option to choose a vacation instead of a wage increase was included over the Union's objections (at least during the negotiating meetings), and changes in the Pension Plan were more in the nature of clarifications than actual shifts in position, or in any case involved issues of quite minor significance.[13]

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13 For example, to describe the reduction in Union representatives' pension contributions as a "concession" as the dissent urges, seems inap-

The Company's stand, however, would be utterly inexplicable without the background of its publicity program. Only when viewed in that context does it become meaningful. We have already indicated that one of the central tenets of "the Boulware approach" is that the "product" or "firm, fair offer" must be marketed vigorously to the "consumers" or employees, to convince them that the Company, and not the Union, is their true representative. GE, the Trial Examiner found, chose to rely "entirely" on its communications program to the virtual exclusion of genuine negotiations, which it sought to evade by any means possible. Bypassing the national negotiators in favor of direct settlement dealings with employees and local officials forms another consistent thread in this pattern. The aim, in a word, was to deal with the Union through the employees, rather than with the employees through the Union.

The Company's refusal to withhold publicizing its offer until the Union had had an opportunity to propose suggested modifications is indicative of this attitude. Here two interests diverged. The command of the Boulware approach was clear: employees and the general public must be barraged with communications that emphasized the generosity of the offer, and restated the firmness of GE's position. A genuine desire to reach a mutual accommoda-

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propriate. GE simply indicated that it would conform its deductions to the actual 1960 actuarial estimates, rather than the higher (and by 1960 incorrect) 1955 assumptions.

As to "yielding" on Exclusion K, the Company, in response to a Union request, revealed that it had *already* revised its health insurance proposal to provide payments to employees insured under other contributory group medical coverage. More simply put, the Company on its own motion (or possibly, although not certainly, in response to a prior union inquiry of September 20) decided that GE employees who paid full premiums on both GE and other contributory group plans should not be required to forego their GE benefits. Those whose spouse, for example, received family coverage under a plan paid in part by another

tion might, on the other hand, have called for GE to await Union comments before taking a stand from which it would be difficult to retreat. GE hardly hesitated. It released the offer the next day, without waiting for Union comments on specific portions.[14]

The most telling effect of GE's marketing campaign was not on the Union, but on GE itself. Having told its employees that it had made a "firm, fair offer," that there was "nothing more to come," and that it would not change its position in the face of "threats" or a strike, GE had in effect rested all on the expectation that it could institute its offer without significant modification. Properly viewed, then, its communications approach determined its take-it-or-leave-it bargaining strategy. Each was the natural complement of the other; if either were substantially changed, the other would in all probability have to be modified as well. It is only in this context that GE's incomprehensible insistence on a January 1 starting date for the pension benefits, and the "explanations" that followed it, can be understood.

All this was brought into the open during the September 28 meeting. Virtually on the eve of the strike, Union

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employer, would still receive nothing under the GE plan. With all due respect, the characterization "minor" still seems appropriate.

14 GE claims that the IUE first released the Company offer to its members. Examining the basis for this claim, we find it insubstantial. First, the IUE releases occurred only after GE announced that it would not delay publication of its offer, but would give it to the media the next morning, August 31. Second, both the instances relied upon involved incidental mimeographed flyers, one of which stated that it was not to be released until after 4 P.M. August 30. When viewed against the Company's coordinated, massive campaign, both instances appear unplanned and inconsequential. For example, a typical employee at some of the larger plants received over 100 written Company communications during September and October. On many days he was subjected to two, and sometimes three or four GE messages, not including oral discussions and meetings with Company supervisors.

negotiators were searching for a way to save face by reconstituting their SUB proposal within the outlines of the Company's costs. Far from being frivolous as the dissent seems to suggest, such last minute attempts at compromise are the stuff of which lasting accommodations and productive labor-management relations are made. The substance of the Company's response to this effort was well put by their chief negotiator, Philip Moore:

> "After all our month of bargaining and after telling the employees before they went to vote that this is it, we would look ridiculous to change it at this late date; and secondly the answer is no."

The Company, having created a view of the bargaining process that admitted of no compromise, was trapped by its own creation.[15] It could no longer seek peace without total victory, for it had by its own words and actions branded any compromise a defeat.

GE urges that section 8(c), 29 U.S.C. §158(c) (1964), prohibits the Board from considering its publicity efforts in passing on the legality of its bargaining conduct. The section reads:

> "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expres-

15 Similarly, GE's insistence on putting its pension and wage benefit proposals into effect before the IUE agreed to them, or the old contract was at an end (contrary to prior practice) dovetailed with its communications program, since its policy of uniformity meant that it intended firmly to see that union members would receive the same and no more. This is but one more example of how a policy such as uniformity, innocent in and of itself, can in context become a vital part of an illegal overall pattern of conduct.

sion contains no threat of reprisal or force or promise of benefit."

GE would have us read that section as a bar to the Board's use of any communications, in any manner, unless the communication itself contained a threat or a promise of benefit. The legislative history, past decisions, and the logic of the statutory framework, however, indicate a contrary conclusion.

The bald prohibition of section 8(c) invited comment when it was enacted, as well as later. Senator Taft replied to some of the criticism of the bill that bears his name:

> "It should be noted that this subsection is limited to 'views, arguments, or opinions' and does not cover instructions, directions, or other statements that would ordinarily be deemed relevant and admissible in courts of law." I Legislative History of the LMRA 1947, at 1541.

The key word is "relevant." The evil at which the section was aimed was the alleged practice of the Board in inferring the existence of an unfair labor practice from a totally unrelated speech or opinion delivered by an employer. Senator Taft later indicated, for example, in the context of a section 8(a)(3) discriminatory firing, that prior statements of the employer would have to be shown to "tie in" with the specific unfair labor practice. I Legislative History of the LMRA 1947, at 1545. Later references to the section described the barred statements as those which were "severable or unrelated," and "irrelevant or immaterial." II Legislative History of the LMRA 1947, at 429 (Senate Report), 549 (House Conference Report). The objective of

8(c) then, was to impose a rule of relevancy on the Board in evaluating the legality of statements by parties to a labor dispute.[16] Its purpose was hardly to eliminate all communications from the Board's purview, for to do so would be to emasculate a statute whose structure depends heavily on evaluation of motive and intent. See e.g., §§8(a)(1), 8(a)(3), 8(a)(5).

The cases have largely supported this view. The Board may rely on communications to establish discriminatory treatment in violation of sections 8(a)(3) and 8(a)(1). See *NLRB* v. *Lipman Bros., Inc.*, 355 F. 2d 15 (1st Cir. 1966); *Hendrix Mfg. Co.* v. *NLRB*, 321 F. 2d 100 (5th Cir. 1963). Employer communications were used to evaluate the presence of a state of mind inconsistent with the obligation to bargain in good faith in *NLRB* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 268 (2d Cir.), *cert. denied*, 375 U.S. 834 (1963); and *NLRB* v. *Herman Sausage Co.*, 275 F. 2d 229 (5th Cir. 1960).

While it is clear that the Board is not to control the substantive terms of a collective bargaining contract, nonetheless the parties must do more than meet.[17] Our brother

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16 See *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 62 n. 5 (1966):

"The wording of the statute indicates, however, that §8(c) was not designed to serve this interest by immunizing all statements made in the course of a labor controversy.

* * * * *

It is more likely that Congress adopted this section for a narrower purpose, i.e., to prevent the Board from attributing anti-union motive [sic] to an employer on the basis of his past statements." [Citations omitted.]

Congress may also have been concerned with the Board's "captive audience" doctrine, by which employer speeches during working time were found to be unfair labor practices. See Casenote, 57 Mich. L. Rev. 615 (1959). That problem, of course, is not present here, and supports our view of the restrictive scope of section 8(c).

17 Thus we find no ground for disagreement with the portion of Judge Burger's dissent in *United Steelworkers of America* v. *NLRB*,

Friendly makes much of the point that General Electric did bargain and reach an "agreement" with the Union. He says that prior 8(a)(5) cases demanded nothing less than a showing of no such desire to reach an agreement, and opines that without such a "definite standard" an 8(a)(5) violation may not be made out. Some cases have indeed spoken of the evil of a "desire not to reach an agreement with the Union" as crucial. While the dissenting opinion cites *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (1st Cir.), cert. denied, 346 U.S. 887 (1953), for that authority, we hasten to note that Judge Magruder was careful in his opinion not to be misled, as our dissenting brother appears to be, by words that seem on the surface quite simple but in practice require a highly pragmatic and individualized interpretation. Judge Magruder did not suggest that "desire not to reach an agreement" could be found, as the dissent suggests, by a clearly delineated series of steps, X_1, X_2, X_3, taken to "point Y, plus a number of additional items, Z_1, Z_2, Z_3." Far from being a devotee of the new math, he would have agreed with Learned Hand that numbers, even more than words, "are utterly inadequate to deal with the fantastically multiform occasions which come up in human life." In the case before Judge Magruder, Reed & Prince submitted a woefully inadequate and demeaning "offer" of a contract. Presumably, the Union could have seen no alternative but to accept it, and had it done so, our brother Friendly would have held that the Company bargained with a "desire to reach an agree-

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390 F. 2d 846 (D.C. Cir. 1967), cert. denied, 391 U.S. 904 (1968), cited by our brother Friendly. Indeed, we are somewhat perplexed at the unusually heavy reliance our dissenting brother places on a dissenting opinion. The author of that opinion is now the Chief Justice of the United States.

ment," and thus had not violated the proscriptions of §8(a)(5). Judge Magruder, on the other hand, said that the "employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if §8(a)(5) is to be read as imposing any substantial obligation at all." 205 F. 2d at 135. His point, of course, was that "desire to reach agreement" may mean different things to different people, but in the context of a meaningful and purposeful reading of section 8(a)(5) it must mean more than a willingness to sign a piece of paper. The statute does not say that any "agreement" reached will validate whatever tactics have been employed to exact it. To imply such a Congressional purpose would be to encourage parties to make their violation so blatant that it would be impossible for the other side to continue to exist without signing. Instead the statute clearly contemplates that to the end of encouraging productive bargaining, the parties must make "a serious effort to resolve differences and reach a common ground," *NLRB* v. *Insurance Agents' Int'l Union,* 361 U.S. 477, 486, 487, 488 (1960), an effort inconsistent with a "predetermined resolve not to budge from an initial position." *NLRB* v. *Truitt Mfg. Co.,* 351 U.S. 149, 154-55 (1956) (Frankfurter, *J.,* concurring). These are not simple tests; they will not be resolved by formular incantations. Sadly, neither will they be so precise that one will always know the exact limits of what is allowed, and what forbidden—but this is a problem hardly unknown in the law or to judges. The difficulty here, however, arises out of the herculean task of legislating a state of mind. Congress has ordered the Board—and this court—to effectuate its policy of encouraging good faith bargaining, and not to avoid it because the mandate is difficult to apply. The Board has done just that. And, on the basis of substantial evidence

we agree. A pattern of conduct by which one party makes it virtually impossible for him to respond to the other—knowing that he is doing so deliberately—should be condemned by the same rationale that prohibits "going through the motions" with a "predetermined resolve not to budge from an initial position." See *NLRB* v. *Truitt Mfg. Co., supra* (concurring opinion).

The employer who leaves for a long vacation, giving his negotiator instructions not to budge is no different from the employer who remains on the scene and commands the same behavior daily. Cf. Cox, *The Duty to Bargain in Good Faith,* 71 Harv. L. Rev. 1401, 1418 & n. 61 (1958). We are assumed to intend the natural and probable consequences of our acts.

The Company and the dissenting opinion seem to take the novel position that the holding in *Insurance Agents'*—that the Board might not forbid a partial strike during bargaining—ousts the Board's control over bargaining tactics. But in *NLRB* v. *Katz,* 369 U.S. 736 (1962), the Court held that at least one tactic—instituting unilateral changes during bargaining—was forbidden, for it put a bargainable topic outside the reach of the bargaining process. GE has done no less; it has, if anything, done more. By its communications and bargaining strategy it in effect painted itself into a corner on *all* bargainable matters.

In order to avoid any misunderstanding of our holding, some additional discussion is in order. We do not today hold that an employer may not communicate with his employees during negotiations. Nor are we deciding that the "best offer first" bargaining technique is forbidden. Moreover, we do not require an employer to engage in "auction bargaining," or, as the dissent seems to suggest,

compel him to make concessions, "minor" or otherwise. See p. 44, *supra*.

Our dissenting brother's peroration conjures up the dark spectre that we have taken a "portentous step" which "'contains seeds of danger for unions'" as well as employers. This picturesque characterization is unfortunate for it is a scare-phrase which tends to distract from the facts in this case. It paints over with a broad stroke the care we have taken to spell out the bounds of our opinion. We hold that an employer may not so combine "take-it-or-leave-it" bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken. It is this specific conduct that GE must avoid in order to comply with the Board's order, and not a carbon copy of every underlying event relied upon by the Board to support its findings. Such conduct, we find, constitutes a refusal to bargain "in fact." *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962). It also constitutes, as the facts of this action demonstrate, an absence of subjective good faith, for it implies that the Company can deliberately bargain and communicate as though the Union did not exist, in clear derogation of the Union's status as exclusive representative of its members under section 9(a). See *NLRB* v. *Herman Sausage Co.*, 275 F. 2d 229, 234 (5th Cir. 1960).

We have considered the Company's other arguments, including those in favor of disqualifying Board Member Fanning, and against reinstating the replaced workers, but we find them unavailing.[18] The petition for review is

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18 We do not think that Board Member Fanning's use of the term "boulwareism" was indicative of bias; the term is more description than invective. See note 1 *supra*.

Since the Board might reasonably have found that the unfair labor practice was a cause of the strike, reinstatement of replaced strikers was proper. *NLRB* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 269 (2d Cir. 1963), cert. denied 375 U.S. 834 (1963).

denied, and the petition for enforcement of the Board's order is granted.[19]

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19 The dissent joins GE and the intervenor Union in attacking the Board's order as wanting in specificity. While a more detailed order would be preferable, we are aware that:

> "Once good faith is found wanting, the scope of relief to be given by the Board is largely a question of administrative discretion." *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 156 (1956) (Frankfurter, J., concurring).

See also *NLRB* v. *Celotex Corp.*, 364 F. 2d 552, 554 (5th Cir. 1966), cert. denied 385 U.S. 987 (1966). Courts do not rubber stamp requests by the NLRB for a contempt citation pursuant to a general bargaining order. See, e.g., *NLRB* v. *Corsicana Cotton Mills*, 179 F. 2d 234 (5th Cir. 1950). It is reasonable to assume that before a court would undertake to cite either a union or an employer for contempt, it would afford the party every opportunity to show that it was not contumacious, and had made a good faith effort to comply with the terms of the bargaining order. See *NLRB* v. *Corsicana, supra; NLRB* v. *Athens Mfg. Co.* 163 F. 2d 255 (5th Cir. 1947).

We are also mindful of the excessively lengthy and complicated history of this case, and are unwilling to add needless pages and innumerable days to it by remanding to the NLRB for a more specific order, or by starting the interminable process anew. To illustrate, the action has been before the Board and the courts for nine years; one procedural matter has been to the Supreme Court already. The negotiating minutes occupy 1300 pages; the transcript (taken on 79 separate dates) before the Trial Examiner another 10,000. The Trial Examiner's Intermediate Report covers some 240 pages in the appendix to this action; GE took 527 exceptions to that report before the full Board. The NLRB's opinion was mercifully short, but briefs before this court ran to almost 500 pages. We need not dwell on the exhibits, which detailed (in detail) a substantial portion of Union and Company publicity efforts.

The dissent (p. 19), undoubtedly relying on newspaper reports, suggests that it is "scarcely possible that the Company's actions are so nearly parallel to those of 1960 . . . ." For what it is worth, we quote the last three paragraphs of a recent news report:

> A company spokesman objected to a description of the company's offer on Tuesday as its "first" because, he said, this implied that there would be a second or third.
>
> He said that the company had put its "whole offer" on the table and that nothing had been held back for later concessions.
>
> Asked if he meant that the offer was the company's final one, he replied, "Not necessarily, but it is all that should be there at this time." New York Times, Oct. 9, 1969.

WATERMAN, *Circuit Judge* (concurring):

I fully concur with my brother Kaufman. Without differing from the majority opinion in any way and without reiterating its arguments, I would challenge my brother Friendly's dissenting assertion that the standard set forth by Judge Kaufman for determining overall bad faith is vague or difficult to apply. A company may make a firm, fair offer to the union and may stand by that offer, but the company should not be permitted to advertise to its employees that it believes in the firmness of its offers for the sake of firmness.

We recognize that a company is entitled to insist on the terms of its original offer if it believes that the union can be made to accept that offer. That GE refused to yield to union demands without giving reasons based upon cost, maintained a "stiff and unbending" posture, used a unilateral letter of intent when final agreement was reached, failed to make significant concessions, and publicized its offer without waiting for union suggestions do not indicate anything except that GE made and stood by what it conceived to be a fair, firm offer.

What makes these practices unfair is GE's "widely publicized stance of unbending firmness," that is, GE's communications to its employees that firmness was one of the company's independent policies. Two distinct evils derive from such publicity. First, publicity regarding firmness tends to make the company seal itself into its original position in such a way that, even if it wished to change that position at a later date, its pride and reputation for truthfulness are so at stake that it cannot do so. Second, publicity regarding firmness fixes in the minds of employees the idea that the company has set itself up as their representative and therefore that the union is superfluous.

Doubtless these evils exist to some extent whenever a company makes, and stands by, a firm fair offer even when there is no company publicity of the kind here involved. However, it seems clear that publicity tends to amplify these undesirable tendencies to the point that, in a case such as this one, the amplification can well be construed to have been activated by a company motive not to bargain in good faith.

On the other side of the ledger there is very little positive good which can derive from company publicity which indicates that a company believes in firmness for firmness' sake. The free speech benefits of publicity in labor negotiations lie in the fact that informed employees will better know whether to vote for or against a strike and how to evaluate the union's performance on their behalf. These benefits can all be reaped by a company which advertises the terms of an offer and its belief that these terms are fair, without also stating that as a matter of policy it can never be persuaded to change the advertised terms. Such advertisement could only tend to convince employees that because firmness is a company policy it is also a company policy to ignore the union. A company, of course, can advertise its belief that its offer is fair, and that, at the particular time, it sees no reason to change its offer even to forestall a strike. This kind of statement is different from advertising that it is company policy never to change any offer in response to union pressure.

This view does not differ from that of the NLRB, nor does it indicate that the Board reached the right result for the wrong reasons. The trial examiner, whose opinion the Board adopted, specifically condemned GE's declarations that "a union could obtain no added benefits that it would not otherwise grant." 150 N.L.R.B. at 279. Because of this dominant wrong, we agree with the trial examiner that

other aspects of the communications program also evidenced bad faith on the facts of this case although not as a matter of law. 150 N.L.R.B. at 274. It does no violence to the doctrine of *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943) to point out which of those factors correctly relied upon by an agency in the case at hand will also be instrumental in determining decisions in the future.

FRIENDLY, *Circuit Judge* (concurring and dissenting):

I agree with my brothers that by refusing to furnish cost information and by bargaining with locals during the strike, GE violated §8(a)(5) of the National Labor Relations Act. I do not believe it also violated the Act by submitting a contributory personal accident insurance plan to the Union and declining to bargain about it until the time for reopening of negotiations. I think also, along lines similar to Member Jenkins' concurring opinion, that other specific conduct of the Company, such as that in regard to the effective date of the pension plan, pp. 12-13, and the form of the strike settlement agreement, p. 17, could properly have been condemned and an appropriate order framed. However, the majority of the Board was at pains to emphasize that its finding of overall bad faith was not based upon identifiable acts or failures to act that GE could avoid in the future but rather

> upon our review of (1) the Respondent's entire course of conduct, (2) its failure to furnish relevant information, (3) its attempts to deal separately with locals and to bypass the national bargaining representative, (4) the manner of its presentation of the accident insurance proposal, (5) the disparagement of the Union as bargaining representative by the communication

program, (6) its conduct of the negotiations themselves, and (7) its attitude or approach as revealed by all these factors.[1]

Such attempts to restrict communications (item 5) and lay down standards with respect to bargaining techniques, attitudes and approaches (items (6) and (7)), bring the Board into collision with §§8(c) and (d) and the important policies they embody. It is easy to understand that anyone reviewing this enormous record would emerge with a good deal of sympathy for the situation of the Union and distaste for the tactics of the employer; no one likes to see a person who regards himself as in a strong position pushing it unduly, even though the fairness of GE's offer is not challenged. But the Act does not empower the Board to translate such feelings into a finding of an unfair labor practice, and judicial sanction of such efforts to intrude into areas which Congress left to the parties may in the long run be quite as detrimental to unions as to employers. See *N. L. R. B.* v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

I.

Before I elaborate my doubts with respect to the determination of overall bad faith, it will be desirable to outline the basis for my disagreement with the conclusion that GE's proffer of a personal accident insurance plan on a contributory basis, before the beginning of the contractual period for bargaining, constituted an independent violation of §8(a)(5). While the Board's order contains no specific reference to this, at least three members relied heavily upon it for their conclusion of overall lack of good faith (see

1 Numbers have been inserted for convenient reference.

item (4)), as does the lead opinion here. If this conclusion is wrong, as I think it to be, such an important element is removed from the "totality of the circumstances" on which the Board relied that, on this ground alone, we could not properly enforce the order as to overall bad faith.

Discussion of the issue must begin by clearly delineating what it is not. No one is suggesting, as the majority intimates, p. 20, that GE could unilaterally change the terms of an agreed insurance plan to the detriment of its workers. Still less is anyone suggesting, see p. 22, that GE could confer a benefit only on non-union members. It is not even claimed that the Company could make a benefit effective for employees represented by a union without advising the union and obtaining the latter's consent. The narrow issue is whether an employer is prohibited from even putting such a proposal to a union at a time when bargaining is not required under the contract unless he is willing to bargain about it then and there.

Section 8(a)(5), as elaborated in §8(d), requires the employer and the representatives of the employees "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . ." When an agreement has been reached, its provisions define what constitute "reasonable times" for bargaining. Here GE and the Union provided in the 1955 Pension and Insurance Agreement in the most explicit terms that "each of the parties voluntarily and unqualifiedly hereby waives any and all rights to require that the other party or parties hereto bargain collectively during the terms of this Agreement, with respect to any such subjects or matters whether or not such matters are covered by this Agreement." See n. 4 to the majority

opinion. Unless language in a labor agreement is to be denied its plain meaning, this protects GE's conduct here. I wholly fail to perceive how the Company's further insistence on a specific renunciation by the Union of strikes, etc., to enforce modifications of insurance and pension benefits outside of a bargaining period in any way qualifies the language I have quoted.

N. L. R. B. v. *Katz*, 369 U.S. 736 (1962), the decision relied upon to support the conclusion that GE's proffer of a contributory personal accident insurance plan violated §8(a)(5), is more striking in its differences than in its resemblances. There, *during a period of bargaining*, the employer *made* three unilateral changes with respect to terms and conditions of employment; the Court's decision, scarcely a surprising one, was that this constituted "a refusal to negotiate *in fact*." 369 U.S. at 743. Here GE merely *submitted a proposal* and did this *at a time when it had no duty to bargain at all.*

While I can understand that an employer's refusal to bargain about a benefit he has voluntarily proffered during the term of an agreement may not be pleasing to a union, that does not violate the Act, at least when the contract expressly permits it. The majority attempts to escalate the problems by suggesting that the course here followed would create "divisive tendencies within the Union," and even enable the Company "to pick the Union apart piece by piece." P. 21. These comments, unsupported by the record, are singularly inappropriate as applied to the offer of a contributory personal accident insurance plan which employees with hazardous occupations were free to accept and those with routine duties to decline, which could hardly affect the Union's position on the next negotiating round since it cost GE nothing other than the costs of administra-

tion, where the Company refused to make capital of the Union's rejection, and when the Union considered the issue so unimportant that it did not even bring the matter up for negotiations during the formal bargaining sessions. One could also argue, in opposition to the majority's position, that the Board's determination offends the policy, although not indeed the letter, of the lengthy proviso to §8(d), since requiring an employer to bargain in a situation such as that presented here, with the corollary that the union may support its bargaining demands with strike threats or strikes, see *NLRB* v. *Lion Oil Co.*, 352 U.S. 282 (1957), undermines the broad purpose of enabling such modifications as are made during the term of an agreement to be made peaceably. However, it is enough for me that nothing in the Act or the court decisions under it can fairly be read to prohibit an employer, during the period of a contract when bargaining would not otherwise be required, from asking a union whether it will consent to his giving a benefit to the employees whom it represents. Cf. *N. L. R. B.* v. *Honolulu Star-Bulletin, Inc.*, 372 F. 2d 691 (9 Cir. 1967).

II.

The objective of §8(a)(5), as stated by the Senate Committee on Education and Labor, S. Rep. No. 573, 74th Cong. 1st Sess. 12 (1935), was to impose a duty on employers "to recognize such representatives as they have been designated . . . and to negotiate with them in a *bona fide* effort to arrive at a collective bargaining agreement . . ." In 1947 the fear was expressed in Congress that the N. L. R. B. "has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or

may not make." H. R. Rep. No. 245, 80th Cong. 1st Sess. 19 (1947). As a result Congress enacted §8(d), expressly providing that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." See *N. L. R. B.* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 402-04 (1952). At the same time, in the light of other actions of the Board, Congress added §8(c), declaring in unequivocal terms that:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

The great bulk of the Board's salutary decisions under §8(a)(5) have been in areas far removed from any possibility of conflict with §§8(c) or (d). Perhaps the most important single group consists of cases where the employer has refused to deal with a union at all or, as in GE's dealing with locals, has negotiated over its head; in such instances, although the Board normally issues a broad order to bargain in good faith, no one supposes that the order dictates just how the bargaining shall be conducted. Beyond that the Board, with the approval of the Supreme Court, has usefully identified a considerable number of practices constituting *per se* violations. These include refusal to sign a written contract embodying an agreement, *H. T. Heinz Co.* v. *N. L. R. B.*, 311 U.S. 514 (1941), a practice now specifically prohibited by §8(d); offering employees, during the course of negotiation, more than was offered through the union, *N. L. R. B.* v. *Crompton-High-*

land Mills, Inc., 337 U.S. 217 (1949); making unilateral changes while bargaining is in process, *N. L. R. B.* v. *Katz, supra*, 369 U.S. 736; refusing to furnish available information needed by the union to evaluate a bargaining position, *N. L. R. B.* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956); and insisting as a condition of agreement upon a subject outside the area of mandatory collective bargaining, *N. L. R. B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

The danger of collision with §§8(c) or (d) arises only when the Board makes a finding of violation although the parties have sat down with each other and have not engaged in any proscribed tactic. Still I have no difficulty with the Board's making a finding of bad faith based on an entire course of conduct so long as the standard of bad faith is, in Judge Magruder's well-known phrase, a "desire not to reach an agreement with the Union." *N. L. R. B.* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (1 Cir.), *cert. denied*, 346 U.S. 887 (1953). In such instances, the difficulties inevitable in an examination of the "totality of the circumstances" and an order based upon them are outweighed by the definiteness of the standard, the consequent feasibility of compliance, and the necessity for such an order if the employer's duty to recognize the union is to be carried out in substance as well as in form. See, e.g., *N. L. R. B.* v. *Montgomery Ward & Co.*, 133 F. 2d 676 (9th Cir. 1943).[1a] However, as Professor Cox remarked in a notable article which has been cited with approval by the Supreme Court,

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1a The lead opinion is in error in its speculation concerning what I "would have held" had I sat in *Reed & Prince* but an agreement had been reached on the employer's terms. There is simply no analogy between Reed & Prince's conduct, see 205 F. 2d at 138-39, and GE's response to the Union by an offer of a 3% increase for the first two years and a 4% increase for the third and numerous additional benefits, plus the further changes referred to below.

N. L. R. B. v. *Insurance Agents' Union, supra,* 361 U.S. at 489-90, and has not suffered from the lapse of a decade, it is "doubtful whether much is gained by retrospective review of the negotiations when the parties have actually bargained together." The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1439 (1958). Here the General Counsel conceded that GE entertained no such prohibited desire and, despite the majority's innuendoes concerning antiunion animus, the Trial Examiner rightly observed that no claim was "made in this case that the respondent was seeking to rid itself of the Union," with which it had been dealing for many years and expected to deal for many more.

The only prior court decision that has approved a finding of overall bad faith when there was a desire to reach an agreement is *United Steelworkers of America* v. *N. L. R. B.,* 390 F. 2d 846 (D.C. Cir. 1967), *cert. denied,* 391 U.S. 904 (1968), a decision rendered over the dissent of Chief Justice (then Judge) Burger. However one may regard that decision, the Board's case was far stronger than here. The employer had refused to budge from an adamant position against a voluntary check-off although it had granted this to a more favored union three years before, had propagandized the employees that a previous similar refusal on its part had destroyed a union, and had advanced no business reasons whatever, "all in a context of vigorous anti-union animus." 390 F. 2d at 852. There was thus considerable basis for inferring that the employer was seeking eventually to rid itself of the union despite its desire to reach an agreement at the moment. Yet even in that context Judge Burger referred to the Board's postulating "the novel and internally inconsistent proposition that a bargainer can be found to have refused to bargain in

good faith even while at the same time it is found to have engaged in bargaining in a good faith effort to reach an agreement and has actually reached a final and binding contract," 390 F. 2d at 853.[2]

Although both the Board and the majority here have been quite explicit in describing what they are not deciding, they are far less informative with respect to what they are. The closest the lead opinion comes to this is its statement (p. 53) that its basis for upholding the order with respect to overall bad faith is "that an employer may not so combine 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken." My brother Waterman, though avowedly concurring fully, takes what seems to me a quite different view, namely, that GE's "bargaining methods" were entirely lawful and only its allegedly publicization of a "stance of unbending firmness" was unfair.

While the lead opinion makes much use of the "take-it-or-leave-it" phrase, it never defines this. I should suppose it meant a resolve to adhere to a position without even listening to and considering the views of the other side. To go further and say that a party, whether employer or union, who, after listening to and considering such proposals, violates §8(a)(5) if he rejects them because of confidence in his own bargaining power, would ignore the explicit command of §8(d)—as Judge Waterman recognizes. Although the taking of such a hard position may be unattractive, the attitude is one which the law allows an employer or a union to take, despite the dictum

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2 I thus cannot understand how the majority can agree with Judge Burger's dissent, n. 17, and still reach the result it does.

in Justice Frankfurter's concurring opinion in *N. L. R. B.* v. *Truitt Mfg. Co., supra,* 351 U.S. at 154.

It surely cannot be, for example, that a union intent on imposing area standards violates §8(b)(3) if it refuses to heed the well-documented presentation of an employer who insists that acceptance of them will drive him out of business. Neither can it be that a union violates §8(b)(3) if it insists on its demands because it knows the employer simply cannot stand a strike.[3] It must be equally true that an employer is not to be condemned for "take-it-or-leave-it" bargaining when, after discussing the union's proposals and supporting arguments, he formulates what he considers a sufficiently attractive offer and refuses to alter it unless convinced an alteration is "right." Hence the Board correctly declined to affix the "take-it-or-leave-it" label which my brother Kaufman uses.

Once we rid ourselves of the prejudice inevitably engendered by this catch-phrase, we reach the argument that a party violates §8(a)(5) if he gets himself into a situation where he is "unable to alter a position once taken," even though he would otherwise be willing to do so.

While this sounds fair enough, as does the Board's somewhat similar remark about the continuing duty to give "unfettered consideration," it would seemingly outlaw practices that no one has considered illegal up to this time. A union that has won a favorable contract from one employer and has broadcast that it will take no less from others seems to me to be quite as "unable to alter a position once

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3 *Cutler* v. *N. L. R. B.*, 395 F. 2d 287 (2 Cir. 1968), is another illustration of the permissibility of union obduracy. Although the employer's failure to press his demands made it possible for this court to uphold the decision in favor of the union without reaching the issue of overall good faith, it would require some naiveté to suppose that any efforts by the employer in that case to get the musicians' union to alter its wage scale would have borne the slightest fruit.

taken" as GE was here, yet I should not have supposed this violated the Act. So also with an employer who has negotiated a contract with one union and has proclaimed that he will do no better for others. To say that taking such positions violates §§8(b)(3) or 8(a)(5) is steering a collision course with §8(d).

Moreover, I find no substantial evidence that GE got itself into the predicament the majority depicts. The best evidence to the contrary consists of the changes the Company in fact made. In response to Union objections to the offer as initially presented informally, GE modified it to include a wage reopener on April 1, 1962, as an alternative to the automatic 4% increase it had proposed. On September 9, *after* it had publicized its offer and in response to feelers from some Union negotiators, it advanced the option of substituting an additional holiday and a fourth week of vacation for employees with 25 years of service in exchange for 1% of this 4%.[4] Twelve days later it agreed to reduce the costs of the Union's representatives' pension plan from 6% of the first $4800 and 15% thereafter to 4% and 10%—which the Union's chief negotiator called "an excellent proposition." Even though, as the majority states, the reduction was responsive to new actuarial calculations, this shows that GE was not using a mere form of words when it said it would make a change if convinced one was "right." Finally, GE yielded on a clause, Exclusion K, in its insurance plan[5] which the chairman of the Union negotiating committee had characterized as having "caused

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4 The Union was offered the choice of exercising this option on a plant-by-plant basis so that plants where employees with longer service predominated could accept the vacation option and others could retain the added pay.

5 This prevented recovery of benefits for an employee or his dependents if they were covered by other group insurance.

more dissatisfaction among the people than anything else." The Union's insurance specialist called this "a good improvement."

The Union's appraisals of the value of these concessions at the time is more impressive than the depreciation of them nine years after the event. Moreover, in appraising such concessions it is important to remember Judge Burger's caution that, although it may sometimes be necessary to consider "the reasonableness of parties' positions on particular issues to determine whether, under all the circumstances of the negotiation, a particular bargaining position was adopted for the purpose of frustrating negotiating generally and thus preventing an agreement," "the courts have been vigilant lest the examination of parties' positions to test good faith become a process of judging, directly or indirectly, the substantive terms of their proposals." *United States Steelworkers of America* v. *N. L. R. B., supra,* 390 F. 2d at 853 (dissenting opinion). By characterizing some of the changes as "of quite minor significance," the lead opinion does precisely that.

I find nothing on the other side substantial enough to outweigh this evidence that GE remained able to adopt changes it thought to be "right." Much is made of the September 28 exchange between Jandreau, Moore, and Hilbert over a Union proposal that the Income Extension Aid funds and part of the money for a wage increase provided in the Company offer be used instead for Supplementary Unemployment Benefits (SUB). The lead opinion, following the Trial Examiner, misinterprets Hilbert's remarks. Hilbert's objection to the Union proposal was that it came at so late a date that the Union could not seriously expect the Company to act upon it. He said that there were only three reasons why the Company might change its offer

at such a time; if they had deliberately held something back for horse-trading; if they had made an error in deciding what was "right"; or if they were so afraid of a strike that they would give in even though they continued to believe that their offer was "right." *If* the first or last reasons had applied, he said, GE would indeed look foolish in the eyes of its employees and the public at large, but they did not apply.[6]

III.

An essential element to the Board's conclusion of GE's offending was the Company's publicity campaign. "The disparagement of the Union as bargaining representative" is item (5) in the Board's bill of particulars. The Board elaborated this by saying it is unlawful "for an employer to mount a campaign, as Respondent did, both before and during negotiations, for the purpose of disparaging and discrediting the statutory representative in the eyes of its employees, to exert pressure on the representative to submit to the will of the employer, and to create the impression that the employer rather than the union is the true protector of the employees' interests."

I find no warrant for such a holding in the language of the statute, its legislative history or decisions construing

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6 More generally, Hilbert's and Moore's remarks must be set in context before they can be properly understood. SUB had first been proposed by the Union and rejected by the Company in the 1958 negotiations. It was again raised and again rejected in the early 1960 meetings on employment security. The Company's opposition was based largely on principle rather than cost, so that Jandreau's protests that he was trying to work within the cost framework of the Company were beside the point in its view. Considered in this context, and with the strike looming four days off, Hilbert's objection that the Union proposal came too late does not seem ill taken. But even here, after Moore had made the statement quoted in the majority opinion and Jandreau had said "There is no sense in being here," Moore replied "Unless there is anything you want us to hear. If you have something new or persuasive, persuade us."

it. GE's communications fit snugly under the phrase "views, argument, or opinion" in §8(c). The very archetypes of what Congress had in mind were communications by an employer to his workers designed to influence their decisions contrary to union views, and communications by unions to workers designed to influence their decisions contrary to employer views. The statute draws no distinctions between communications by an employer in an effort to head off organization[7] and communications after organization intended to show that he is doing right by his employees and will do no more under the threat of a strike. Congress had enough faith in the common sense of the American working man to believe he did not need—or want—to be shielded by a government agency from hearing whatever arguments employers or unions desired to make to him. Freedom of choice by employees after hearing all relevant arguments is the cornerstone of the National Labor Relations Act.

As for the legislative history of §8(c), the full text of Senator Taft's remarks in this context was:

> The purpose of this language is to make it clear that the Board is not to use any utterances containing [no] threats or promises of benefits as either an unfair practice standing alone or as making some act which would otherwise not be an unfair labor practice, an unfair labor practice. It should be noted that this subsection is limited to "views, argument, or opinions" and does not cover instructions, directions, or other statements which might be deemed admissions under ordinary rules of evidence. In other words, this section does not make incompetent, evidence which would or-

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7 See generally Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 66-92 (1964).

> dinarily be deemed relevant and admissible in courts of law. 2 Legislative History of the LMRA, 1947, at 1541 (1948).

It is plain that GE's communications came under the protection of the statute, and not the exception which Senator Taft described. The word "relevant" in Senator Taft's speech cannot be blown up to such a degree as to render the amendment largely nugatory. The case is in sharp contrast with *NLRB* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 268 (2 Cir.), cert. denied, 375 U.S. 834 (1963), cited by the Board and the majority, where the company's general manager said that he would "die and go to hell before he would sign a contract" and told his employees to "get those union agitating sons of bitches out of Fitzgerald." *NLRB* v. *Herman Sausage Co.*, 275 F. 2d 299 (5th Cir. 1960), the only other case cited by the Board in support of this part of its opinion, is equally inapposite.

The Trial Examiner's criticisms of GE's communications as being one-sided and "massive," and as portraying the union negotiators in an unfavorable light, which were endorsed by the Board and are reflected in the lead opinion, see fn. 14, ignore the whole thrust of §8(c). Although Mr. Justice Black was in dissent in *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 67-68 (1966), there was no disagreement with his statement:

> When Congress passed the National Labor Relations Act, it must have known, as almost all people do, that in labor disputes both sides are masters of the arts of vilification, invective and exaggeration.

It is for unions and employers, not for a government agency, to determine how "massive" their communications shall be.

The Examiner coined a phrase, echoed both by the Board and in the lead opinion, see p. 45, namely, that GE's communications program was an attempt "to deal with the Union through the employees rather than with the employees through the Union." Somewhat parallel to this is the opinion's statement that the Company "deliberately bargain[ed] and communicate[d] as though the Union did not exist, in clear derogation of the Union's status as exclusive representative of its members under section 9(a)," p. 53. Picturesque characterizations of this sort, at such sharp variance with the record, scarcely aid the quest for a right result. Members of Congress would probably be surprised to learn that being "exclusive representatives" means that interested parties may not go to constituents in an endeavor to influence the representatives to depart from positions they have taken. There can be nothing wrong in an employer's urging employees to communicate with their representatives simply because the communication is one the representatives do not want to hear. I thus find it impossible to accept the proposition that, by exercising its §8(c) right to persuade the employees and by encouraging them to exercise their right to persuade their representatives, GE was somehow "ignoring the legitimacy and relevance of the Union's position as statutory representative of its members" (p. 41).

Apparently accepting this, Judge Waterman would narrow GE's offending, not only with respect to the publicity program but on the whole issue of overall bad faith, to its communicating "that firmness was one of the company's independent policies." The first thing to be said about this is that even if my brother were right, we would not be justified in enforcing the Board's order on that basis. "An administrative order cannot be upheld unless the grounds

upon which the agency acted in exercising its powers were those upon which its action can be sustained." *S. E. C.* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943), and the Board's opinion leaned so heavily on the Company's disparagement of the Union that we cannot disregard this on the basis that it would have ruled the same way even had it known it was wrong in its reliance. Moreover, GE certainly could not be sure it would be in compliance if it desisted merely from the one tactic that Judge Waterman condemns. My second difficulty is that his position would seemingly outlaw conduct such as in the cases I have put—where a union "finally" tells workers that it will not take less from one employer than it has won from another or an employer "finally" proclaims he will give no more to one union than he has to another. The third is that if his or the lead opinion implies that GE's publicity got it into a position where it could not yield even if it was convinced that it should, the necessary factual support does not exist. There is no need to repeat what has been said in the previous section of this opinion on that score. I add only, in response to Judge Waterman's proposed rationale, that, as I read the Trial Examiner's report, he made no finding that the publicity had produced any such result. His condemnation of the Company's "finality" campaign referred solely to communications following the resumption of negotiations after the strike vote, and the sense in which he understood the term "finality" is clarified by his statement that "The repeated mentions of the finality of the offer . . . were coupled throughout . . . [this period] with declarations pointing up the inevitable futility of a strike, regardless of its duration, in the light of the Company's policy not to give more *simply* to avert a strike." (Emphasis added.)

Since a policy not to give in just because of a strike is not a violation of §8(a)(5), I cannot understand why communication of that policy to employees should be. The fact that strikes to coerce acceptance of union demands are "part and parcel of the process of collective bargaining," *NLRB v. Insurance Agents' Union, supra,* 361 U.S. at 495, does not forbid the employer's doing his best to avoid being coerced by them. This, of course, does not change his duty to continue negotiations and to negotiate in good faith. But so far as economic warfare and vulnerability to it are concerned, the Act allows the parties a maximum of self-protection. No one denies that §8(c) protects employer communications attempting to persuade employees that they should not strike because the offer fully meets their needs, because union leaders are seeking a strike for personal reasons, or because a strike will cost too much in lost pay. To prohibit an employer from adding that the mere fact of a strike would gain nothing in the way of further concessions would remove his most important and most relevant argument. Yet this is all that GE's much discussed finality campaign amounted to and, with one insignificant exception, the campaign made the point in the narrowest way it could. GE did not say "If you strike we will automatically lock ourselves into our offer," but only that GE was not deliberately holding anything back and had to be convinced that its original offer was no longer "right" before it would make a change.[8]

It is doubtless true in labor as in other negotiations that the louder people shout, the harder it becomes for them to change their positions without unacceptable loss

8 I thus cannot accept Judge Waterman's characterization that GE publicized "that, as a matter of policy, it can never be persuaded to change the advertised terms."

of face. In that sense any positive public declaration, whether by an employer or by a union, may run counter to the objective of securing industrial peace by promoting agreement. But the Board has been expressly prohibited from promoting peace by restricting speech. Conformably with the dictates of the First Amendment, Congress, when it enacted §8(c), determined the dangers that free expression might entail for successful bargaining were a lesser risk than to have the Board police employer or union speech.

IV.

Even if one were to take the benevolent view toward the portion of the Board's opinion and order relating to overall bad faith that is done by the majority, it is beyond debate that if this decision should stand, it would open up wholly new problem areas in the application of §§8(a)(5) and 8(b)(3). I cannot perceive any sufficient reason for doing this when, as I see it, the order cannot be enforced in any practical sense and deals with events of half a generation ago.

The only standard of conduct set for GE by the Board's opinion is that a mix of the "fair, firm offer" technique pursued to an unknown point X, plus a communications program pursued to an equally unknown point Y, plus a number of additional items, Z_1, Z_2, and Z_3, is proscribed. This already sufficient confusion is now compounded by the difference in my brothers' efforts at elucidation.

In view of the general obscurity of what GE is and is not permitted to do, the Company could take little comfort from the majority's assurance that it will be given a full opportunity to show it has made a good faith effort at compliance before it is held in contempt. In fact, however,

no contempt proceeding could be successfully maintained. For the Supreme Court has very recently declared, in the closely related context of an equitable decree with respect to work stoppages, that "The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension." *Longshoremen's Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967).[9]

The venerable age this case has attained is a further reason for declining to churn up waters that already are troubled enough. We are dealing with an alleged unfair labor practice of *nine years ago*. Four years were taken by the Board to render a decision—itself some indication that Congress never intended to impose any such "herculean task." Passing over the two years spent in quarrels in the courts over venue and the Union's right to intervene, three more elapsed before the case was argued to us. Since then there have been two further negotiations, in 1963 and 1966. Another, in which the IUE's bargaining position has been significantly bolstered by a decision of this court in which I joined, *General Electric Co.* v. *NLRB*, 412 F. 2d 512 (1969), is now in progress. Although the unions have called a strike and filed unfair labor practice charges, in part because of GE's adhering to a "fair, firm offer" of a first year increase less than the unions sought and with annual wage reopeners instead of automatic increases,

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9 Acknowledging the impossibility of enforcing the order as written, and proposing that this court should supply a rationale which the Board's decision lacks, a sympathetic commentator has suggested that the only way to sustain the order would be to "hold single offer bargaining to be an unfair labor practice." Cooper, Boulwarism and the Duty to Bargain in Good Faith, 20 Rutgers L. Rev. 653, 689-92 (1966). But we could not uphold it on that basis even if the evidence supported a finding of "single offer bargaining," which it does not, see *SEC* v. *Chenery Corp.*, *supra*, 318 U.S. 80. The lead opinion rightly does not do this, and the concurring opinion expressly disclaims any such view.

many of the principals in the 1960 negotiations are no longer on the scene and it is scarcely possible that the Company's actions are so nearly parallel to those of 1960 that an order in this case, even had it been made earlier, would have supported a contempt proceeding.

I am well aware of the Supreme Court's statement that "Congress has introduced no time limitation into the Act except that in §10(b)," *NLRB* v. *Katz*, 369 U.S. 736, 748 n. 16 (1962). Still, as it seems to me, a court must have some discretion to decline to enforce a Labor Board order relating to practices nearly a decade in the past when, as here, the parties have engaged in bargaining, any harmful effect of the alleged unfair labor practice has been dissipated, the case was one of first impression, and there has thus been no "stubborn refusal to abide by the law." *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 705 (1944).

In conclusion, I respectfully suggest, as Judge Burger did in *United Steelworkers of America* v. *N. L. R. B.*, *supra*, 390 F. 2d at 858, "that today's holding contains the seeds of danger for unions in their collective bargaining rights" as well as for employers in the exercise of theirs. It constitutes also a serious indentation of §§8(c) and (d), if not, indeed, of the First Amendment. For the reasons I have indicated, I believe the majority's decision to be deeply mistaken—the familiar instance of a hard case producing bad law. In any event, I think that, because of the confusion as to what the Board's order means and the lapse of time, the case is exceedingly inappropriate for taking such a portentous step.

I would grant enforcement with respect to the failure to furnish information and the bargaining with locals, and would otherwise deny.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29,502

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

GENERAL ELECTRIC COMPANY,

Respondent,

—and—

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Intervenor.

No. 29,576

GENERAL ELECTRIC COMPANY,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Before:

WATERMAN, FRIENDLY and KAUFMAN,

Circuit Judges.

THESE CAUSES were submitted to this Court upon a petition to review, and a petition to enforce, an order of the National Labor Relations Board dated December 16, 1964, against General Electric Company, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on June 3, 1969, and has considered the briefs and transcript of record filed in these causes. On October 28, 1969, the Court, being fully advised in the premises handed down its opinion granting enforcement of the Board's order and denying the petition to review. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that General Electric Company, its officers, agents, successors and assigns, abide and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against General Electric Company.

STERRY R. WATERMAN
Judge, United States Court of Appeals
for the Second Circuit

IRVING R. KAUFMAN
Judge, United States Court of Appeals
for the Second Circuit

APPENDIX B

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The relevant provisions of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 et seq.) are as follows:

Section 8(a)

> "It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> • • • • •
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Section 8(c)

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Section 8(d)

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency estab-

lished to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purpose of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

Section 10(e)

"The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by *substantial* evidence *on the record considered as a whole* shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the

hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

Section 10(f)

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy

of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."